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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 2001

RUSTY ROBERTS, ET AL
Petitioner
v.

CARDINAL SERVICES, INC.; ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 31, 2001

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QUESTIONS PRESENTED

By its unwavering insistence on a minimum of thirty percent of a seaman's time having been spent on employer-owned vessels, does the opinion of the court below conflict with the decision of the Louisiana Supreme Court in *Wisner v. Professional Divers of New Orleans*, 731 So.2d 200 (La. 1999), the decision of the Third Circuit Court of Appeals in *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143; (3d Cir. 1999), the decision of the Second Circuit Court of Appeals in *Fisher v. Nichols*, 81 F.3d 319, 323 (CA2 1996), and the admonition of this Court in *Chandris v. Latsis,* 515 U.S. 347, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995) against the creation of "detailed tests . . . that tend to become ends in and of themselves"?

By its failure to take into account the change in employment circumstances resulting from Cardinal's ownership of liftboats, its ceasing to use chartered liftboats in jobs involving petitioner, and its assignment of petitioner **exclusively** to its own liftboats for nearly a year prior to his accident, does the opinion of the court below conflict with the decision of this Court in *Chandris,* 515 U.S. at 371-72, requiring consideration of a change in the circumstances of the seaman's occupation, and reserving to the jury such an issue of fact because reasonable persons could differ as to whether petitioner was a seaman. *Id., McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991)?

Does this case presents the case of first impression in which the employer, here Cardinal, through its acquisition or ownership of a fleet of vessels, thereafter assigned the seaman to work exclusively on its own vessels so that in the same manner as a change of the employee's duties is to be considered, such a change in the employer's policies should play a determinative role in establishing seaman status?

PARTIES TO THIS PROCEEDING

Petitioners are Sandra Roberts and Rusty Roberts, individually and on behalf of their minor children, Chase & Jarod Roberts, plaintiffs in the district court and appellants in the court of appeal.

Respondent is Cardinal Services, Inc., a defendant in the district court and an appellee in the court of appeal.

Kerr-McGee Corporation was a defendant below but has no interest in the matters addressed in this Petition for Writ of Certiorari.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fifth Circuit appears at appendix A and is reported at 266 F.3d 368 (5th Cir. La. 2001). The district court opinions appear at appendices B and C and are reported at 2000 U.S. Dist. LEXIS 15631 and at 2000 U.S. Dist. LEXIS 13690.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on October 2, 2001. There was no application for rehearing.

STATUTE INVOLVED

46 U.S.C. § 688(a) reads as follows:

Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statues of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner, Rusty Roberts, claims to be a seaman and a member of the crew of a fleet of liftboats (jack-up barges) owned by his employer, Respondent, Cardinal Services, Inc. These liftboats were used to perform plug and abandonment services for offshore platforms in the Gulf of Mexico.[1] Although petitioner spent his first two hitches offshore on liftboats that were not owned by Cardinal (12/3/96 – 12/31/96 and 3/1/97 – 4/9/97), he spent **all** of the remaining time of his vessel employment (from 7/21/97 until the date of his accident on May 21, 1998) exclusively on liftboats owned by Cardinal.

A. The Consequences of the Decision Below

The decision of the Fifth Circuit unfairly denies seaman status to offshore construction workers who become newly assigned exclusively to a fleet of vessels owned and even recently acquired by an employer after the employer had previously assigned the seaman to work on chartered or other non-owned vessels. It also affirmed the removal of the important factual issue of seaman status in this case from the jury.

B. Proceedings Below

In May of 1998, the Cardinal crew, including petitioner, was performing plug and abandonment work on a well owned by Oryx Energy Company (Kerr-McGee Corporation is its successor in interest , R.156). As the Cardinal employees were perforating the well, the perforation gun discharged prematurely while petitioner was standing next to it. (R.277,283,284), severely injuring him. Suit was brought suit under 46 U.S.C. § 688 against Cardinal and pursuant to 43 U.S.C. § 1331 and Louisiana law against Oryx (as the work performed by the crew was claimed to be ultra hazardous as defined by Louisiana law).

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[1] A photograph of a liftboat servicing a stationary platform may be found at http://www.superiorenergy.com/marine_250_dixie_legacy.html

Kerr-McGee Corporation moved for summary judgment which was granted by the district court's judgment entered on September 13, 2000. (App. C 44a), holding that the work performed by petitioner was not ultra hazardous.

Cardinal moved for summary judgment alleging that petitioner was not a seaman (R.774,775) The district court granted this motion by order and reasons entered on October 18, 2000 (App. B, 38a) holding that petitioner had an inadequate temporal connection to a vessel or fleet of vessels and accordingly, was not a seaman under the Jones Act.

The United States Court of Appeals for the Fifth Circuit affirmed both decisions of the district court (App. A, 1a). Only the seaman status issues are before this Court.

C. A Brief Statement of the Pertinent Facts

On May 21, 1998, the date of the accident, Rusty Roberts was employed by Cardinal as a pump operator on a plug and abandonment crew. (R.272, 275).[2] Cardinal was the owner of the largest jack-up fleet in the world. (R.1719A).[3]

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[2] The site of a seaman's injury, here a stationary platform, does not affect recovery if the injured person is, in fact, a seaman. *Ardoin v. J. Ray McDermott, Inc.*, 641 F.2d277, 282 (5th Cir. 1981). This is because Roberts' specific activity at the time of his accident is not dispositive of the issue of seaman status. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 149 (3d Cir. 1998); *Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (CA5 1983),* cert. denied, *464 U.S. 1069, 79 L. Ed. 2d 212, 104 S. Ct. 974 (1984).*It is well established that the injury does not have to happen on the vessel. *Dean v. McKie Co.*, 771 F.Supp. 466, 471 (D. Mass. 1991) and authority therein cited.

[3] Less than a year after the accident, Cardinal was sold to Superior Energy Services which also owns the L/B RAYA, the first liftboat to which petitioner was assigned.

Plug and abandonment work involves cementing the well bore of each producing zone, coming up hole, cementing the hole closed nearer the surface, cutting the drill pipe fifteen feet below the mudline, and removing the pipe for salvage or disposal. Since there are no mudlines or such bodies of water on land, this work is necessarily entirely maritime in nature and is a part of the removal and sale or other salvage of offshore platforms, when the oil and gas reserves play out.

Roberts was employed by Cardinal in November of 1996. Although his first two hitches offshore were on liftboats not owned by Cardinal (12/3/96 – 12/31/96, the L/B RAYA, and 3/1/97 – 4/9/97, L/B MR. FRANK) (App. 52a, Cardinal's memorandum in support of motion for summary judgment at page 14, (R.968-1606,1708-1709), he spent **all** of the remaining time of his vessel employment (from 7/21/97 until the date of his accident on May 21, 1998) exclusively on liftboats owned by Cardinal (App. 52b). Every one of his remaining vessel assignments, totaling thirteen, were performed on Cardinal vessels (R.968-1606,1708-1709). This meant that from July 21, 1997 to May 21, 1998, Roberts spent 100% of his vessel time on liftboats owned by Cardinal.

Moreover and even using his entire period of employment, Roberts spent a minimum of 41.31 percent of his work time on vessels (R.954,968-1606,1704), more than two-thirds of which was on Cardinal vessels.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals, on an Important Federal Question, Conflicts with Decisions of This Court, Those of Other Circuits, and a Decision of the Supreme Court of Louisiana

A. The Application by the Court of Appeals of the Thirty-Percent Rule Without a Factual Examination that Considered the Cardinal Vessel-Assignment Policy Subsequent to the Hiring of Roberts Was Plain Error.

By its unwavering insistence on the application of the thirty percent test as the minimum time having been spent on employer-owned vessels without an analysis of the entire circumstances of the employment of the putative seaman, here petitioner, the opinion of the court below conflicts with the decision of the Louisiana Supreme Court in *Wisner v. Professional Divers of New Orleans*, 731 So.2d 200 (La. 1999), the decision of the Third Circuit Court of Appeals in *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143; (3d Cir. 1999), the decision of the Second Circuit Court of Appeals in *Fisher v. Nichols*, 81 F.3d 319, 323 (CA2 1996), and the admonition of this Court in *Chandris,* 515 U.S. at 371-72 against the creation of "detailed tests . . . that tend to become ends in and of themselves."

Furthermore, by its failure to take into account the change in circumstances resulting from Cardinal's acquisition and ownership of liftboats, Cardinal's ceasing to use chartered liftboats in jobs involving petitioner, and the assignment of petitioner exclusively to Cardinal's own liftboats for nearly a year prior to his accident, the opinion of the court below conflicts with the decision of this Court in *Chandris* 515 U.S. at 372, requiring consideration of a change in the circumstances of the seaman's occupation, and reserving to the jury such an issue of fact because reasonable persons could differ as to whether petitioner was a seaman under these circumtances. *Chandris* 515 U.S. at 372; *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). See *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143; 153-54 (3d Cir. 1999) (That court of appeal made a proper analysis).

Such a careful factual analysis is particularly important in this case which is apparently of first impression of the situation in which it is the employer, which through its acquisition or ownership of a fleet of vessels, thereafter assigns the seaman to work exclusively on its own vessels with apparently the same duties subsequently to the seaman's initial employment. In the same manner as a change of the employee's duties has been mandated by this Court to be considered by the courts and by the trier of fact, the change in the employer's policies must play an essential role in determining seaman status that was not considered by the court of appeal.

This Court has reiterated that "the question of ... who is a 'seaman[ ]' is a mixed question of law and fact". *Chandris,* 515 U.S. at 369-370. "It is for the court to define the statutory standard.... The jury finds the facts and, in these cases, applies the legal standard ... If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a [seaman], it is a question for the jury." *Wilander*, 498 U.S. at 356. Compare, *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 33 (C.A.2 (N.Y.) 1996) (reversing summary judgment on the issue of seaman status).

Iin *Chandris*, this Court "focus[ed] upon the essence of what it means to be a seaman and ... eschew[ed] the temptation to create detailed tests ... that tend to become ends in and of themselves," 115 S.Ct. at 2190. Your Honors stressed that:

> "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." ... [T]he ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

115 S.Ct. at 2190-91 (citations omitted).

This Court in *Chandris* explained that seaman status necessarily includes a temporal element:

> A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. **This figure of course serves as no more than a guideline established by years of experience, and departure from it would certainly be justified in appropriate cases.** As we have said,
>
>> [t]he inquiry into seaman status is of necessity fact specific; it would depend upon the nature of the vessel and the employee's precise relation to it (internal citation omitted). Nevertheless, we believe that courts, employers and maritime workers can all benefit from the reference to the general principles. And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to ***vessels in navigation***, the court may take the question from the jury by granting summary judgment or directed verdict.

Chandris at 371 [Emphases added].

It is clear from the analysis in *Chandris* that the Court was focused on distinguishing land-based workers from sea-based workers for coverage under the Jones Act. In doing so, the Court adopted the 30 percent guideline for time worked on *vessels in navigation*.

In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997), this Court further noted:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id at 555.

In the instant case, petitioner served on a "group of vessels" and so comes within the rule "allowing seaman status for those workers who have the requisite connection with an identifiable fleet of vessels, a finite group of vessels under common ownership or control." *Papai* at 556 citing *Chandris* at 366.

> An important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and *the latter concept requires a requisite degree of common ownership or control.*

Papai at 560. Emphasis added.

Petitioner worked a total of fifteen offshore vessel assignments in connection with his employment with respondent. Only the first two assignments were on vessels not owned by Cardinal (R.968-1606,1708-1709). The assignments to Cardinal vessels were 13 (compared to two to non-owned vessels) (R.790, 881, 1708-1709), were consecutive, and reflected a change in the employer's method of working that was as important as a new assignment given to the employee-seaman.

The court of appeal did not take this into consideration in determining whether Roberts had a requisite connection to a fleet of vessels but instead imposed the "thirty percent rule of thumb" only to time spent on vessels owned by Respondent, even though the last thirteen out of fifteen voyages were on Cardinal vessels. This was plain error, resulting in a conflict among the circuits and with the Louisiana Supreme Court.

B. Roberts' Work Was Maritime in Nature, Was Dangerous, and Took Him to Sea

This inquiry concentrates on whether or not the work takes a putative seaman to sea and involves exposure to perils of the sea or whether the work simply involves shore-based maritime work and workers being transported to and fro or transiently working over water. *Foster v. SubSea International, Inc.*, 1998 U.S. Dist. LEXIS 11725, *9-10 (E.D. La. 1998). In. *Papai*, 520 U.S. at 555, this Court mandated that the inquiry regarding the "nature of the employee's connection with the vessel must concentrate on whether the employee's duties take him to sea." See *Chandris,* 515 U.S. at 368, *Wallace v. Oceaneering International*, 727 F.2d 427, 434 (5th Cir. 1984); Caffrey, Comment, Splicing the Net: A Legislative Answer to the Problem of Seaman Status under the Jones Act, 14 Mar. Law. 361 (1990) and particularly 369-370; *Coulter v. Texaco*, 714 F.2d 467, 469 (5th Cir. 1983); Powell, Note: A New Highlight on an Old Doctrine and the Evaporation of the Fleet Rule: *Munguia v. Chevron U.S.A., Inc.*, 10 Mar. Law. 326 (1985) and particularly text at notes 70-84; Robertson, A New Approach to Determining Seaman Status, 64 Tex. L. Rev. 79 (1985).

The mission of the Cardinal liftboat and plug and abandon crews, under the command of the Cardinal offshore supervisor, was plugging and abandoning an offshore platform, marine construction work which is traditionally maritime in nature.

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 544-47, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995) (maritime construction work); *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064-65 (C.A.11 (Fla.) 1996) (conversion of drilling vessel to a fish processing vessel); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1119-19 (C.A.5 (Miss.) 1995) (repairing and maintaining a jack-up vessel);[4] *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 282 (C.A.5 (La.) 1981); *Pederson v. Powell-Duffryn Terminals*, 34 F.Supp.2d 915, *10-11 (D.N.J. 1999) (underwater construction on the pilings of a pier); *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252, 258-59 (3d Cir. 1998) (artificial reef).

Moreover, the nature of Roberts' work, like that of everyone else who worked for fourteen to eighteen hours per day and ate and slept on jack-up vessels, was dangerous and subject to all of the perils of the sea. *Boy Scouts of America v. Graham*, 76 F.3d 1045, 1047-48 (C.A.9 (Cal.) 1996), opinion modified to irrelevant extent on denial of rehearing at 1996 WL 324646, (C.A.9 (Cal.) 1996). The liftboats' voyages out to the platforms and between platforms were subject to water, wind, and weather. See *Miller v. International Diving and Consulting Services, Inc.*, 669 So.2d 1246, 1252-54, 95-873 La.App. 5 Cir. 2/14/96, (La.App. 5 Cir. 1996). Compare, *Fisher v. Nichols*, 81 F.3d 319, 322-23 (C.A.2 (N.Y.) 1996).

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[4] As to the first "connection" inquiry, the incident can be described in general terms as an injury to a worker while repairing and maintaining a jack-up rig in navigable waters. Without a doubt, worker injuries, particularly to those involved in repair and maintenance, can have a disruptive impact on maritime commerce by stalling or delaying the primary activity of the vessel. As to the second inquiry, the repair and maintenance of a jack-up drilling rig on navigable waters is certainly a traditional maritime activity.

In this regard, *Wisner v. Professional Divers of New Orleans*, 98-1755 (La. 03/02/99), 731 So.2d 200 (La. 1999) (severely criticized by the court of appeal) is instructive. In that case, rejecting a slavish adherence to any test and particularly to the "fleet of vessels" test, the Louisiana Supreme Court focused on whether the duties of the putative seaman were primarily sea-based activities. Finding them so, it reversed the summary judgment rendered against him and entered judgment in his favor. Like Wisner, although not to the same obvious extent, Roberts was exposed to "the special hazards and disadvantages to which they who go to sea in ships are subjected." According, the issue is factual and its determination should have been reserved for jury consideration. See also, *Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3rd Cir. 1998)* and *Foster v. Subsea International, Inc.*, 1998 U.S. Dist. LEXIS 11725 (E.D. La. 1998).

CONCLUSION

Plug and abandon work is exclusively maritime work that was done by Cardinal with the aid of its own liftboats within their capacity and depth. Rusty Roberts was a plug and abandon operator that spent a substantial percentage of his time traveling, working, eating, and sleeping on liftboats, first on two that were chartered by Cardinal, and thereafter exclusively on liftboats and spud barges that were owned by Cardinal. The change in petitioner's vessel circumstances and his exclusive assignment to Cardinal's liftboats constituted a change in circumstances that was as significant as the change from officebound to seagoing status hypothesized by this Court in *Chandris*, 515 U.S. at 371-372. Yet the court of appeal, although it had the facts before it (see App. D, 53a.) did not reevaluate what petitioner did from that time forward. Rather, it accepted Cardinal's analysis of the entire period of employment and found it insufficient as a matter of law. This wooden adherence to the thirty-percent rule conflicts with the guidance provided by this Court, the decisions of other courts of appeal, and the *Wisner* decision of the Louisiana Supreme Court, and constituted plain error.

For all these reasons, Petitioners request that this Court grant their Petition for Certiorari.

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED OCTOBER 2, 2001

RUSTY ROBERTS, individually and on behalf of their minor-children, Chase & Jarod Roberts; Sandra Roberts Plaintiffs-Appellants, versusCARDINAL SERVICES, INC.; ET AL.; Defendants, CARDINAL SERVICES, INC.; KERR-MCGEECORPORATION, successor-in-interest to Oryx Energy Company, Defendants-Appellees.
No. 00-31232
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
266 F.3d 368, 2001 U.S. App. LEXIS 21256
October 2, 2001, Decided

[*1] Appeal from the United States District Court for the Eastern District of Louisiana. 99-CV-430-N. Edith Brown Clement, US District Judge.

DISPOSITION: Affirmed.

JUDGES: Before JOLLY, SMITH, and WIENER, Circuit Judges.

WIENER, Circuit Judge

This maritime action was brought in district court against Defendant-Appellee Cardinal Services, Inc. ("Cardinal") under the Jones Act, n1 and against Defendant-Appellee Kerr-McGee Corporation ("Kerr-McGee") as successor-in-interest to Oryx Energy Company, under the Louisiana Civil Code's provisions governing negligence, n2 premises liability, n3 and strict liability, n4 which are incorporated by reference through the Outer Continental Shelf Lands Act ("OCSLA"). n5 Suit was filed by Plaintiffs-Appellants Rusty Roberts and his wife, Sandra Roberts, individually and on behalf of their minor children (collectively "Plaintiffs") after Rusty Roberts, an employee of Cardinal, was injured while working on a stationary offshore platform owned by Oryx and subsequently acquired by Kerr-

McGee. n6 The Plaintiffs now appeal the district court's grants of summary judgment dismissing their claims against Cardinal and Kerr-McGee. We affirm.

--Footnotes--

n1 *46 U.S.C. app. § 688.*

[*2]

n2 La. Civ. Code Ann. art. 2315.

n3 La. Civ. Code Ann. art. 2317.1 and 2322.

n4 La. Civ. Code Ann. art. 667.

n5 *43 U.S.C. §§ 1331*-56.

n6 To avoid confusion, the OCSLA defendants will be referred to throughout the balance of this opinion as "Kerr-McGee" even if, at the particular time referred to, Kerr-McGee had not yet succeeded to Oryx.

--EndFootnotes--

I. Facts and Proceedings

Cardinal provides a range of services to the energy industry in Louisiana and Texas as well as in the Gulf of Mexico offshore those states. Among the oil and gas well services performed by Cardinal in those areas are wireline, electric line, plugging and abandoning ("p&a"), cementing, and pumping services, as well as acquisition and interpretation of oilfield data. Cardinal's offshore services are performed on both fixed and movable facilities belonging to others as well as on board its own "liftboats."

Roberts worked for Cardinal in its p&a department from 1996 until the date of his injury in 1998, first as a p&a helper and then, following a promotion, as a p&a operator. The Kerr-McGee platform[*3] on which he was injured while helping to perform a p&a operation is located on the outer Continental Shelf in the Gulf of Mexico, off the Louisiana coast. He was injured by the accidental firing of a perforation gun attached to a wireline that was being used on the platform by the crew of which he was a member in connection with plugging a well. (A "wireline" is a continuous cable used to perform various subsurface functions in a well, including the lowering and raising of various tools, instruments, and other devices. One of the downhole tools used on a wireline is a "perforation gun," a device that originally used cartridges similar to rifle or pistol ammunition but evolved to use "shaped charges," cylinder-shaped ammunition which is cone-shaped internally and fires directionally. It is formed in layers, one a brittle compound of explosive material and the other a metal alloy. When fired by any of several methods, this bazooka-like ammunition shoots a short, concentrated stream of molten alloy or "plasma" in the direction at which the open end of the charge's conically shaped interior is aimed. Generally, perforating guns are used either early in the life of a well to fractionate**[*4]** ("frac") a hydrocarbon-bearing formation or zone so as to commence or enhance production or, late in the life of a well or of a particular formation, to perforate casing or tubing in preparation for "squeezing" or sealing off the well or the zone to "plug and abandon" it.)

On the evening of Roberts's injury, the Cardinal crew was attempting a p&a job on the platform in question. Cardinal was responsible for all aspects of the project, Kerr-McGee having reserved only the right to observe and inspect Cardinal's work to ensure its satisfactory completion. The Cardinal crew had assembled a perforating gun, with its shaped charges aimed in a single direction, and had lowered the gun into the well on a wireline. This particular gun included an exterior sleeve and was rigged to fire when the pressure around it increased to a predetermined pounds-per-square inch (psi) level. During its initial descent down the well, the gun encountered a closed or partially closed downhole valve, so the crew reversed the downward direction of the wireline, raising it and the attached perforation gun to the top of the wellbore, close to which Roberts was standing. A valve in the well tubing below was then[*5] opened by a Cardinal employee, resulting in a sudden increase in pressure in the wellbore, which presumably caused the gun to fire. n7 Unfortunately, the shaped charges happened to be aimed in Roberts's direction, and he was severely injured when they fired.

--Footnotes--

n7 It is not altogether clear from the record whether the increase of pressure resulting from the opening of the valve below was the sole cause of detonation of the gun. After discussing possible ways in which the shear screws that controlled the actuation of the gun could have been sheared, however, the engineer's report concludes: "The exact cause of the premature firing may be only academic. The fundamental cause was almost certainly the sudden application of pressure to the assembly. This has been stated repeatedly in the various reports and there is no reason to doubt it." Accordingly, we will refer to the opening of the valve in the well tubing below the gun, with the resulting increase in pressure, as the cause of the gun's firing.

--EndFootnotes--

In their lawsuit, [*6] the Plaintiffs asserted negligence claims against Roberts's employer, Cardinal, under the Jones Act, advancing that he was a seaman. They brought negligence, premises liability, and strict liability claims against Kerr-McGee as owner of the platform, asserting responsibility under Louisiana law as incorporated by reference in the OCSLA. n8

--Footnotes--

n8 *43 U.S.C. § 1333*(a)(2)(A).

--EndFootnotes--

Cardinal filed a motion for summary judgment in which it asserted that Roberts did not have a sufficient temporal connection to a Cardinal vessel or fleet of vessels to be a Jones Act seaman. Agreeing with Cardinal as a matter of law, the district court granted summary judgment and dismissed the Plaintiffs' claims against the employer.

Kerr-McGee also filed a motion for summary judgment in which it asserted that the Plaintiffs could not prevail on any of the theories of Louisiana law that they proffered under the OCSLA. As the Plaintiffs did not oppose Kerr-McGee's summary judgment motion on the premises liability claims[*7] asserted under articles 2317.1 and 2322 of the Louisiana Civil Code, the court granted Kerr-McGee's motion as to those claims, and the Plaintiffs do not re-urge them on appeal.

The Plaintiffs conceded that, in its contract with Cardinal for the performance of the May 1998 p&a operation, Kerr-McGee had not retained the requisite operational control to support the imposition of liability for the allegedly negligent acts of its independent contractor, precluding recovery against Kerr-McGee vicariously for any negligence of Cardinal. The Plaintiffs therefore grounded their arts. 2315 and 667 negligence and strict liability claims against Kerr-McGee on allegations that the use of a wireline perforation gun in the p&a operation on Kerr-McGee's platform was an "ultrahazardous activity."

The district court granted Kerr-McGee's summary judgment motion and dismissed these claims after refusing to classify wireline perforation as ultrahazardous under Louisiana law because it is a common activity in the oilpatch that can be and indeed generally is performed safely. Plaintiffs timely filed a notice of appeal.

II. Analysis

A. Standard of Review

We review a grant of summary judgment[*8] de novo, applying the same standard as the district court. n9 A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact. n10 An issue is material if its resolution could affect the outcome of the action. n11 In deciding whether a fact issue has been created, we must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. n12

--Footnotes--

n9 *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

n10 Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

n11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

n12 See *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

--EndFootnotes--

Determination whether an injured worker is a seaman under the Jones Act is a mixed question of law and fact. n13 "If reasonable persons, applying[*9] the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury. ... Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." n14 Our review of such a mixed question is plenary.

--Footnotes--

n13 *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995).

n14 *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991); see also *Papai*, 520 U.S. at 554.

--EndFootnotes--

The standard for summary judgment mirrors that for judgment as a matter of law. n15 Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence. n16 In reviewing all the evidence, the court must disregard all evidence favorable to the moving[***10**] party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached. n17

--Footnotes--

n15 *Celotex Corp.*, 477 U.S. at 323.

n16 *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

n17 Id. at 151.

--EndFootnotes--

B. Seaman Status under the Jones Act

The district court's grant of Cardinal's motion for summary judgment was grounded in the determination that Roberts was not a seaman, and thus not eligible to recover under the Jones Act. This conclusion was based on the court's finding that Roberts did not have the requisite "substantial connection" to a vessel or an identifiable fleet of vessels under Cardinal's common ownership or control.

The Jones Act provides that "any seaman" who sustains personal injury in the course of his employment may maintain an action for damages at law, [***11**] with the right of a trial by jury. n18 The Act does not define "seaman," and "therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection." n19 When Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA") n20 in 1927, it furnished some content to the term "seaman," albeit indirectly. The LHWCA provides a remedy for land-based maritime workers who are injured during their employment, but the Act explicitly excludes from its coverage "a master or member of a crew of any vessel." n21 In Chandris, Inc. v. Latsis, the Supreme Court reiterated that "the Jones Act and the LHWCA are mutually exclusive compensation regimes," and that the LHWCA's reference to "a master or member of a crew" is "a refinement of the term 'seaman' in the Jones Act." n22 Thus, the inquiry into seaman status for Jones Act purposes requires a determination whether the injured plaintiff is a "master or member of a crew of any vessel."

--Footnotes--

n18 46 U.S.C. app. § 688.

n19 *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995).

[*12]

n20 *33 U.S.C. § 901* et seq.

n21 Id. § 902(3)(G); see also *Chandris*, 515 U.S. at 355.

n22 *Chandris*, 515 U.S. at 355-56.

--EndFootnotes--

In *Chandris*, the Supreme Court clearly articulated the test to apply when making this determination:

First,..."an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission.'"...

Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. n23

The purpose of the test stated by the court in *Chandris* and reaffirmed in *Harbor Tug & Barge Company v. Papai* n24 is to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. n25

--Footnotes--

n23 *Id.* at 368 (quoting *McDermott Int'l, Inc. v.* Wilander, 498 U.S. 337, 355, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991) (quoting *Offshore Co. v. Robison,* 266 F.2d 769, 779 (5th Cir. 1959))).

[*13]

n24 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997).

n25 *Chandris*, 515 U.S. at 368; see also Papai, 520 U.S. at 560; *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 (5th Cir. 1999).

--EndFootnotes--

With respect to the inquiry into whether the injured worker's connection to a vessel is substantial in terms of both duration (the temporal prong) and nature (the functional prong), the Chandris Court emphasized that the test is conjunctive, stating that "we think it is important that a seaman's connection to a vessel in fact be substantial in both respects." n26 The Chandris Court further clarified the application of the temporal prong of the test when it offered the following guidance for determining whether a plaintiff's connection to a vessel is substantial in duration:

Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of[*14] course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases.... Nevertheless, we believe that courts, employers, and maritime workers can all benefit from reference to these general principles. And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict. n27

Synthesizing these refinements leads to the understanding that the plaintiff who fails to show that his connection to a vessel in navigation is substantial in duration will be precluded from recovering as a seaman under the Jones Act, and that, as a general rule, he must show this by demonstrating that 30 percent or more of his time is spent in service of that vessel.

--Footnotes--

n26 *Chandris*, 515 U.S. at 371 (emphasis added).

n27 Id.

--EndFootnotes--

The 30 percent floor does not change when an "identifiable[***15**] group" of vessels in navigation is at issue, rather than just one vessel. In addressing the case before us in *St. Romain v. Industrial Fabrication and Repair Service, Inc.*, n28 we summarized our ruling in *Hufnagel v. Omega Service Industries, Inc.* n29 observing,

> We held that Hufnagel did not qualify as a seaman because he could not establish a substantial connection to either a single vessel or to an identifiable fleet of vessels....Our decisions after Bertrand have reaffirmed the essential principle that to qualify as a seaman an employee must establish an attachment to a vessel or to an identifiable fleet of vessels. n30

We have left no doubt that the 30 percent threshold for determining substantial temporal connection must be applied, regardless of whether one vessel or several are at issue.

--Footnotes--

n28 203 F.3d 376 (5th Cir. 2000).

n29 182 F.3d 340 (5th Cir. 1999).

n30 *St. Romain*, 203 F.3d at 379-380 (emphasis added). See

also *Chandris,* 515 U.S. at 367 ("Since *Barrett*, the Fifth Circuit consistently has analyzed the problem in terms of the percentage of work performed on vessels for the employer in question-and has declined to find seaman status where the employee spent less than 30 percent of his time aboard ship.").
--EndFootnotes--
[*16]

Finally, the Court has constructed the framework for determining the presence of "an identifiable group of vessels." In Chandris, reviewing the development of the substantial connection requirement, the Court discussed our modification of the test for seaman status when more than a single vessel is involved:

> Soon after Robison, the Fifth Circuit modified the test to allow seaman status for those workers who had the requisite connection with an "identifiable fleet" of vessels, a finite group of vessels under common ownership or control. n31

Subsequently, in *Papai*, the Court expounded further on this point:

> We...adverted to the group of vessels concept in Chandris. We described it as a rule "allowing seaman status for those workers who had the requisite connection with an 'identifiable fleet' of vessels, a finite group of vessels under common ownership or control."...
>
> In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman-status determination, the question is whether the vessels are subject to common ownership or control. n32

--Footnotes--

n31 *Chandris*, 515 U.S. at 366 (citing *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960)) (emphasis added).

[*17]

n32 *Harbor Tug & Barge Co. v.* Papai, 520 U.S. 548, 556-57, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997) (quoting *Chandris,* 515 U.S. at 366*)* (internal citations omitted) (emphasis added).

--EndFootnotes--

For purposes of the Plaintiffs' Jones Act claims against Cardinal, the issue of seaman status turns on whether Roberts satisfied the temporal prong of the substantial connection test. The Plaintiffs insist that the district court erred in its application of the 30 percent guideline when it counted only the time that Roberts spent on Cardinal's liftboats and disregarded the time that he spent on other Cardinal vessels and on vessels owned by third parties. According to a breakdown of Roberts's work time, he spent 21.45 percent of his time in a shop on land, 37.24 percent of his time performing p&a work on platforms with no vessel involvement, 13.54 percent of his time performing p&a work on platforms with third-party vessels alongside, 24.88 percent of his time performing p&a work on platforms with a Cardinal liftboat alongside, 1.99 percent of his time in transit on Cardinal vessels,**[*18]** and .9 percent of his time performing p&a work on the CARDINAL 1, a Cardinal-owned vessel. The district court stated that "Roberts only spent 24.88% of his time assigned to Cardinal boats."

Roberts contends that his time in transit and his time on the CARDINAL 1 should be included, and, more significantly, that the time he spent on platforms with an adjacent third-party vessel should be included as well. If only Roberts's transit time and CARDINAL 1 time were to be added, he would still fall short of the 30 percent threshold, aggregating a total of but 27.77 percent; only if his third-party vessel time were counted would his total time on board vessels "of common ownership or control" rise above 30 percent, to 41.31 percent. n33

--Footnotes--

n33 We note, as did the district court, that Roberts also asserted in his deposition that three projects on which he worked for Cardinal were billed as platform jobs, but were actually performed on Cardinal liftboats. This could indeed change the calculation, had Roberts offered some evidence other than just his own conclusional statements to counter Cardinal's evidence in the form of invoices for those jobs that do not indicate the use of a Cardinal liftboat on the jobs. As the district court correctly noted, "conclusory [sic] statements in an affidavit do not provide facts that will counter summary judgment evidence, and testimony based on conjecture alone is insufficient to raise an issue to defeat summary judgment." *Lechuga v. Southern Pacific Transportation Co.*, 949 F.2d 790, 798 (5th Cir. 1992) (footnotes omitted).

--EndFootnotes--

[*19]

The Plaintiffs contend that the work time involving third-party vessels should be counted. They declare that the "temporal connection establishing a 30 percent rule of thumb is meant to determine whether an employee is sea-based versus land-based. It is not meant to be applied to the fleet requirement." It is generally true, as we noted above, that the fundamental purpose of the seaman-status inquiry is to separate the sea-based maritime employees who are entitled to Jones Act protection from the land-based employees who must find a remedy under the LHWCA. The Plaintiffs are flatly wrong, however, when they assert that the 30 percent guideline is not meant to be applied to the fleet requirement. Indeed, application of the 30 percent test is the very means by which a substantial temporal connection is determined, regardless whether a single vessel or a group of vessels is at issue. And, when a group of vessels is at issue, a worker who aspires to seaman status must show that at least 30 percent of his time was spent on vessels, every one of which was under his defendant-employer's common ownership or control. As recently as Hufnagel, we reaffirmed our commitment to this application**[*20]** of the 30 percent test, and we do so yet again today. n34

--Footnotes--

n34 *Hufnagel*, 182 F.3d at 348 ("'We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard.'...[A] group of vessels will only qualify where it is a specific, identifiable fleet or a finite group of vessels, subject to common ownership or control." (quoting *Barrett v. Chevron*, U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (emphasis omitted)).

--EndFootnotes--

We acknowledge *Chandris's* insistence that "[the 30 percent threshold] serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases." n35 We recognize as well that if all of Roberts's time aboard Cardinal-owned vessels were to be counted, he would come quite close (27.7 percent) to meeting the 30 percent requirement. Nevertheless, we do not perceive the instant case to be one that justifies an exceptional departure from the 30 percent**[*21]** test. In *Wisner v. Professional Divers of New Orleans*, n36 the Louisiana Supreme Court relied on our language in *Bertrand v. International Mooring & Marine, Inc.* n37 and *Wallace v. Oceaneering International* n38 to reverse a grant of summary judgment against a commercial diver. The *Wisner* court classified the diver as a seaman, despite the fact that he did not have a substantial connection to a fleet under common ownership or control, because the diver "faced regular exposure to the perils of the sea." n39 Specifically, the Wisner court concluded,

> In sum, the formulations or "tests" employed by the

> various courts are simply different ways to arrive at the same basic point: the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go to sea in ships are subjected." n40

We consider the subsequent treatment by a Louisiana Court of Appeal, curtailing the *Wisner* opinion, to be apt. In the post-*Wisner* case of *Little v. Amoco Production Company*, n41 the state appellate court noted first that the United States Supreme Court's interpretations[*22] are controlling in matters of federal law, clearly indicating that, in any disagreement between the application in Wisner and the test adopted in *Chandris* and *Papai*, the test enunciated in the latter controls. n42 More substantively, the court of appeal posited that *Wisner* could be classified as falling within a "well-established exception" to the general 30 percent substantial connection requirement. n43 The exception, as defined by language in our pre-*Chandris* decision in *Bertrand*, would be that "Jones Act coverage should not be withheld because the vessels are not under the employer's common ownership or control, when claimants are continuously subjected to the perils of the sea and engaged in classical seaman's work." n44 The court of appeal in *Little*, still highlighting the Wisner court's reliance on our language, noted that "[a] diver's work necessarily involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not, like so many offshore field occupations, an art developed in land work and transposed to a maritime setting." n45

--Footnotes--

n35 *Chandris*, 515 U.S. at 371.

[*23]

n36 731 So.2d 200 (La. 1999).

n37 700 F.2d 240 (5th Cir. 1983).

n38 727 F.2d 427 (5th Cir. 1984).

n39 *Wisner*, 731 So.2d at 202.

n40 *Id.* at 205 (quoting *Chandris, Inc. v. Latsis,* 515 U.S. 347, 370, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995) (citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 90 L. Ed. 1099, 66 S. Ct. 872 (1946) (Stone, C.J., dissenting))).

n41 734 So.2d 933 (La. App. 1 Cir. 1999).

n42 *Id.* at 938.

n43 *Id.*.

n44 Id. (quoting *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240, 245 (5th Cir. 1983)).

n45 Id. (quoting *Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir. 1983)) (emphasis added).

--EndFootnotes--

In *St. Romain v. Industrial Fabrication and Repair Service, Inc.*, we refused to classify a p&a worker like Roberts as a seaman when he failed to establish that he had a substantial connection to an identifiable fleet of vessels. n46 This holding[*24] alone is conclusive; but if any doubt remained because Roberts's time aboard Cardinal vessels comes close to the 30 percent threshold, the *Little* court's reconciliation of *Wisner* with United States Supreme Court precedent extinguished that doubt as well.

--Footnotes--

n46 203 F.3d 376, 379-80 (5th Cir. 2000).

--EndFootnotes--

Even though a professional diver is peculiarly -- and totally -- subject to the perils of the sea and thus may, under special circumstances, qualify as a seaman without showing the requisite degree of temporal connection, a p&a crewman, who practices "an art developed in land work and transposed to a maritime setting," cannot. The Plaintiffs have failed to demonstrate the presence of all elements of the conjunctive test for Roberts's seaman status, and their attempt to bring him within a possible exception to the rule fails. Accordingly, we see no reason to depart from our well-established rule, as reaffirmed in *Hufnagel* and *St. Romain*, that a worker who fails to show that at least 30 percent[*25] of his time is spent on vessels under the common ownership or control of his employer is precluded from recovering as a seaman under the Jones Act. We therefore affirm the district court's grant of summary judgment in favor of Cardinal.

C. Use of Wireline Perforation Gun an Ultrahazardous Activity under Louisiana Law.

The Plaintiffs appeal the district court's grant of summary judgment in favor of Kerr-McGee, dismissing their claims for vicarious and strict liability under Louisiana Civil Code arts. 2315 and 667. They assert that the district court erred when it determined that Kerr-McGee's independent contractor, Cardinal, was not engaged in an ultrahazardous activity while using the perforating gun in conducting the p&a job for Kerr-McGee. The Plaintiffs focus particularly on the district court's refusal to include wireline perforation within the ultrahazardous category of "blasting with explosives." Agreeing that wireline perforation is not congruent with "blasting with explosives" as that term is used in art. 667, and being convinced that wireline perforation does not satisfy Louisiana's broader jurisprudential test for ultrahazardous activities, we affirm the district[*26] court's grant of Kerr-McGee's summary judgment dismissing the Plaintiffs' claims under arts. 2315 and 667.

1. The Article 2315 Claim.

a. Framework

Before we proceed to analyze the Plaintiffs' negligence and vicarious liability claims against Kerr-McGee, an abbreviated review of the application of Louisiana's basic tort provision, art. 2315, appears to be in order. That article states that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." n47 Classically, a tort in Louisiana comprises art. 2315's four indispensable elements: act, damage, cause, and fault. The Louisiana Supreme Court observed in *Langlois v. Allied Chemical Corp.* n48 that "fault is the key word in art. 2315." n49 In construing "fault" in art. 2315, *Langlois* further explained, the courts "[go] to the many other articles in our Code as well as statutes and other laws which deal with the responsibility of certain persons, the responsibility in certain relationships, and the responsibility which arises due to certain types of activities." n50 In particular, noted the *Langlois* court, there is "sound jurisprudential authority that[*27] liability for dangerous and hazardous activities of man flows from Civil Code Article 2315 by analogy with other Civil Code Articles." n51

--Footnotes--

n47 La. Civ. Code Ann. art. 2315 (emphasis added).

n48 *258 La. 1067, 249 So.2d 133 (La. 1971)* (overruled by statute on other grounds).

n49 *249 So.2d at 136.*

n50 Id. at 137.

n51 Id. at 139 (citing *Egan v. Hotel Grunewald Co., 129 La. 163, 55 So. 750 (1911));* see also *Perkins v. F. I. E. Corp., 762 F.2d 1250, 1259 (5th Cir. 1985)* (tracing the development of Louisiana law with respect to the imposition of liability under art. 2315 for conducting ultrahazardous activities).

--EndFootnotes--

In our review of Louisiana law in Perkins v. F. I. E. Corp., n52 we took cognizance of the Louisiana courts' adherence to the structure established in Langlois, most notably, for purposes of the instant case, the imposition of liability for ultrahazardous activities under art. 2315 by analogy to art.

[*28]667. n53 As we also noted in Perkins, however, the Louisiana Supreme Court, in Kent v. Gulf States Utilities Co., n54 later seemed to "cast liability for ultrahazardous activities directly upon art. 2315 alone, without relying, either directly or by analogy, on any other codal [sic] article." n55 Referred to as absolute liability, or liability without fault, this concept is perhaps more easily understood when viewed as "legal fault" or fault supplied by law. Thus, art. 2315's fault element is imputed, i.e., supplied by law, when designated persons elect to engage in particularly high-risk activities, even though they perform them lawfully, skillfully, and free of negligent or intentional fault in the usual sense. n56 To date, the jurisprudential list of such activities includes only aerial crop dusting, storing hazardous materials, pile driving, and blasting with explosives.

--Footnotes--

n52 *762 F.2d 1250 (5th Cir. 1985).*

n53 *Id. at 1261.*

n54 *418 So.2d 493 (La. 1982).*

n55 *Perkins, 762 F.2d at 1261.*

n56 See, e.g., *Kent v. Gulf States Utilities Co., 418 So.2d 493, 498 (La. 1982)* (explaining that "liability is imposed [upon the enterpriser] as a matter of policy when harm results from the risks inherent in the nature of the [ultrahazardous] activity" even though the enterpriser may not have been "negligent in any respect").

--EndFootnotes--

[*29]

b. Activities Ultrahazardous De Jure

Within this framework, the Plaintiffs' claims against Kerr-McGee must be analyzed against the backdrop of vicarious tort liability under Louisiana law. A well-established general rule under Louisiana law is that a principal is not liable for the delictual or quasi-delictual offenses (torts) committed by an agent who is an independent contractor in the course of performing its contractual duties. n57 There are, however, two equally well-established exceptions to this rule: A principal may be liable (1) if it maintains operational control over the activity in question, or (2) if, even absent such control, the activity engaged in by the independent contractor is "ultrahazardous." n58 Given the Plaintiffs' concession that Kerr-McGee did not retain the requisite operational control over Cardinal, Kerr-McGee could only be held liable in tort for damages caused to the Plaintiffs when Cardinal's wireline perforating gun discharged accidentally if that independent contractor's use of the device constituted an ultrahazardous activity and produced the injury. Thus, the dispositive question here is whether Cardinal's use of the wireline perforation gun**[*30]** in the p&a activity that it was performing for Kerr-McGee, being the activity that inflicted injury on Roberts, was ultrahazardous. n59

--Footnotes--

n57 *Ainsworth v. Shell Offshore, Inc., 829 F.2d 548, 549 (5th Cir. 1987),* cert. denied, *485 U.S. 1034, 99 L. Ed. 2d 908, 108 S. Ct. 1593 (1988); Triplette v. Exxon Corp., 554 So.2d 1361, 1362 (La. App. 1st Cir. 1989).*

n58 *Ainsworth, 829 F.2d at 549-50; Triplette, 554 So.2d at 1362-63.*

n59 We note Kerr-McGee's assertion that, in any case, it was not "directly engaged" in wireline perforation, as required by the test for imposing liability on the principal. As we join the district court in ruling that wireline perforation is not an ultrahazardous activity, we do not reach the question whether Kerr-McGee was engaged in the activity by virtue of its independent contractor's engagement in the activity.

--EndFootnotes--

Under Louisiana law, an activity may be ultrahazardous either as a matter of law or[*31] by classification under the test that has been created judicially. Again, activities that have been categorized in Louisiana as ultrahazardous as a matter of law are (1) storage of toxic gas, (2) crop dusting with airplanes, (3) pile driving, and (4) blasting with explosives. n60 As the Louisiana Supreme Court observed in Kent v. Gulf States Utilities, each of these four undertakings is an activity that "can cause injury to others, even when conducted with the greatest prudence and care." n61

--Footnotes--

n60 *Kent v. Gulf States Utilities Co.*, 418 So.2d 493, 498 (La. 1982) (citing *Langlois v. Allied Chemical Corp.*, 258 La. 1067, 249 So.2d 133 (La. 1971); *Gotreaux v. Gary*, 232 La. 373, 94 So.2d 293 (La. 1957); *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So.2d 627 (La. 1968); *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 80 So.2d 845 (La. 1955)).

n61 *Kent*, 418 So.2d at 498.

--EndFootnotes--

This concept is embodied in[*32] the jurisprudential test for ultrahazardous activities that we outlined in *Perkins v. F. I. E. Corp.* n62 Under the *Perkins* test, an activity is ultrahazardous if it (1) relates to land or to other immovables; (2) causes the injury, and the defendant was directly engaged in the injury-producing activity; and (3) does not require the substandard conduct of a third party to cause injury. n63

--Footnotes--

n62 762 F.2d 1250 (5th Cir. 1985).

n63 *Id.* at 1267-68.

--EndFootnotes--

The Plaintiffs insist that wireline perforation is a manifestation of "blasting with explosives," and should therefore be classified as an ultrahazardous activity as a matter of law. We disagree. In *Fontenot v. Magnolia Petroleum Co.*, n64 the case that decreed "blasting with explosives" to be an ultrahazardous activity, the Louisiana Supreme Court reversed a judgment in favor of defendants whose geophysical exploration activities on the property of one owner caused damage to the plaintiffs' homes on adjoining land. The geophysical[*33] operations involved the intentional detonation of 10-pound charges of Nitramon "S" at a depth of approximately 70 feet below the surface, and the damage to the plaintiffs' homes (including cracks in walls and ceilings, and broken cement foundations) was alleged to have resulted from the "vibrations and concussions radiating in the soil from the point of the explosions conducted by defendants." n65 The Fontenot court observed:

> It has been universally recognized that when, as here, the defendant, though without fault, is engaged in a lawful business, conducted according to modern and approved methods and with reasonable care, by such activities causes risk or peril to others, the doctrine of absolute liability is clearly applicable. n66

Stated differently, even though the blasting may have been conducted responsibly and according to the latest accepted methods, the defendants were nonetheless accountable for any unavoidable damage that flowed from the activity.

--Footnotes--

n64 227 La. 866, 80 So.2d 845 (La. 1955).

n65 80 So.2d at 846-47.

n66 *Id.* at 849.

--EndFootnotes--

[*34]

Subsequently, in *Schexnayder v. Bunge Corp.,* n67 we characterized *Fontenot* as involving "purposeful subterranean explosions in connection with oil exploration," and approved the trial court's jury instruction on ultrahazardous activities, which stated that "an ultra-hazardous activity is an activity which [sic], even when conducted with the greatest of care and prudence, could cause a foreseeable harm or damage to those in the neighborhood." n68 Thus, for over a quarter-century we have adhered to the Louisiana Supreme Court's reasoning in Fontenot for classifying the subsurface detonation of explosives as ultrahazardous: Foreseeably, such an activity could cause unavoidable collateral damage to neighbors, even if conducted with due care.

--Footnotes--

n67 508 F.2d 1069 (5th Cir. 1975).

n68 *Id.* at 1072 n.3.

--EndFootnotes--

Lowering a perforation gun down a well on a wireline and firing it to pierce drill pipe or tubing in an oil and gas well simply does not fit within this rubric. In sharp[*35] contrast to the damage incurred by the neighbors in *Fontenot,* which was inflicted on structures located off the owners' premises by the inevitable, omni-directional underground shock waves produced by the intentional blasting on the owners' premises, the injuries incurred by Roberts were caused by the accidental detonation of the shaped-charge ammunition of the perforation gun, not downhole as intended but at the surface of the owner's premises, i.e., on the Kerr-McGee fixed platform. As we have noted, a perforation gun's shaped charges fire only in the direction toward which their open, conical ends are pointed. When conducted "according to modern and approved methods and with reasonable care," n69 a perforating gun is lowered down a well to a predetermined depth, is fired in one or more predetermined directions, produces a force sufficient only to pierce the tubing or casing, and, at most, a matter of but several additional inches of the adjacent formation. The firing of the shaped charges causes virtually no incidental damage to the gun or the wellbore, and no collateral damage whatsoever by way of vibrations, even to the owner's premises, much less to adjoining property, [*36] no matter how proximate.

--Footnotes--

n69 *Fontenot*, 80 So.2d at 849.

--EndFootnotes--

In the unfortunate occurrence that injured Roberts, the business end of the shaped charges -- like the muzzle of a gun -- happened to be pointed in his direction at a time when the gun was at the surface rather than downhole. His severe injuries were a direct, primary result of the gun's accidental firing, not collateral damage from shock waves or vibrations. And the unintentional firing of the gun was caused by an act of man, presumably the opening of the valve, in turn causing a spike in pressure. We therefore reject the Plaintiffs' contention that the wireline perforation activity during which Roberts was injured is a variety of blasting with explosives and thus ultrahazardous as a matter of law.

c. Ultrahazardous De Facto -

Wireline perforation also fails to meet at least one of the three conjunctive prongs of the broader *Perkins* test for ultrahazardousness under Louisiana law. The parties agree that wireline perforation of[*37] a well in connection with a p&a operation relates to land or to other immovables, and we shall assume arguendo that, through Cardinal, its independent contractor, Kerr-McGee was "directly engaged" in the wireline perforation activity even though the requisite control over Cardinal had not been retained by Kerr-McGee. n70 Thus, we are concerned here only with the third prong of the Perkins test, whether wireline perforation is an activity that "can cause injury to others, even when conducted with the greatest prudence and care." n71 For essentially the same reasons that distinguish the perforation activity from blasting with explosives, we hold that the former is not a manifestation of the latter.

--Footnotes--

n70 See supra note 59 and accompanying text.

n71 *Perkins v. F. I. E. Corp.*, 762 F.2d 1250, 1268 (5th Cir. 1985) (quoting *Kent v. Gulf States Utilities Co.*, 418 So.2d 493, 498) (La. 1982)).

--EndFootnotes--

First, there is ample evidence in the record to support the contention that wireline[*38] perforation, whether employing electrically or pressure-activated firing heads to detonate the shaped charges, can be, and indeed generally is, safely performed thousands of times a year. There is further evidence suggesting that when the (infrequent) accident does occur in connection with wireline perforation, it is directly traceable to human error, either in the initial choice to employ a pressure-activated device in a particular well, or in the failure correctly to follow safety procedures. These features of wireline perforation are similar to the transmission of electricity over power lines which was the challenged activity in *Kent*. Regarding that activity, the *Kent* court stated that "the transmission of electricity over isolated high tension power lines is an everyday occurrence in every parish in this state and can be done without a high degree of risk of injury." n72 The same can be said with equal certainty of wireline perforation of oil and gas wells. We therefore conclude that, unlike the stereotypical ultrahazardous activities recognized by statutes and courts of Louisiana, wireline perforation "is likely to cause damage only when there is substandard conduct[*39] on someone's part." n73 None can dispute that this declaration is applicable to the sequence of events that transpired in the instant accident; it apparently occurred when someone opened the downhole valve, which increased the pressure, causing the perforation gun to fire while it was at the surface rather than hundreds of feet down the wellbore, as intended.

--Footnotes--

n72 *Kent*, 418 So.2d at 498-99.

n73 *CNG Producing Co. v. Columbia Gulf Transmission Corp.*, 709 F.2d 959, 962 (5th Cir. 1983) (emphasis in original).

--EndFootnotes--

This position is consistent with our prior decisions. In *Ainsworth v. Shell Offshore, Inc.*, n74 we concluded that "drilling operations do not satisfy the third [element of the *Perkins* test]," holding that such activities were not ultrahazardous. n75 As observed by the district court and reiterated above, wireline perforation is performed frequently in conjunction with both enhancing the flow of oil and gas in a well and plugging and abandoning particular strata **[*40]**or entire wells. This comports with the intermediate appellate court's observation in *Bergeron v. Blake Drilling & Workover Co., Inc.* n76 that "[a] well cannot produce oil or gas unless it is perforated. Thus, perforation is an internal and indispensable element of every well." n77 Wireline perforation is therefore easily classifiable as a "drilling operation," and thus not ultrahazardous under Ainsworth.

--Footnotes--

n74 829 F.2d 548 (5th Cir. 1987).

n75 *Id.* at 550.

n76 599 So.2d 827 (La.App. 1 Cir. 1992).

n77 *Id.* at 840.

--EndFootnotes--

We distinguish our holding today from the *Bergeron* court's holding which at first blush appears to be to the contrary. In *Bergeron*, a Louisiana court of appeal stated, "even if one found that perforating was not ultrahazardous[,] a finding that perforating is a [sic] inherently and intrinsically dangerous work is unavoidable." n78 As the district court in the instant case correctly noted, however, the *Bergeron*[*41] court stopped short of classifying wireline perforation as an "ultrahazardous activity," characterizing it instead as "inherently dangerous," in the law of Louisiana a distinctly different term of art. Here, the district court continued:

> By holding Kerr-McGee liable under article 2315 for [an] "inherently dangerous" activity, this Court would be expanding the Louisiana Supreme Court's policy behind ultrahazardous activity as announced in [Kent]. In Kent, the Louisiana Supreme Court held that the ultrahazardous activity classification "was created for the rare instances in which the activity can cause injury to others, even when conducted with the greatest prudence and care." This Court does not find that an "inherently dangerous" activity fits within the "special category" of ultrahazardous liability. n79

We adopt this reasoning, adding only the observation that the perforating gun in Bergeron had a firing head that was activated by electricity, not by pressure as in the instant case. n80 In contrast to electrical firing of some perforation guns, only the external application of sufficient psi of pressure can detonate a pressure-activated firing head[*42] like the one involved in Roberts's injury. Thus, the difference between an activity that is inherently dangerous and one that is ultrahazardous serves to distinguish Bergeron from the instant case, and the difference in the risk of accidental discharge between the firing devices involved in the two cases distinguishes them even further.

--Footnotes--

n78 *Id.* at 839.

n79 *Roberts v. Cardinal Services, Inc.*, 2000 U.S. Dist. LEXIS 13690, at *8, 2000 WL 1300390, at *3 (E.D.La. 2000) (internal citations omitted).

n80 *Bergeron*, 599 So.2d at 838-39 (reporting that "the gun consists of high explosives and a blasting cap to detonate the shaped cartridges").

--EndFootnotes--

In summary, when we view the operable facts of the instant case in the light most favorable to the Plaintiffs as nonmovants, we are satisfied that use of a wireline perforation gun in a p&a operation cannot be held to be an ultrahazardous activity, either de jure or de facto. Not only is such perforation factually distinguishable from "blasting[*43] with explosives," an actuality that would render such perforation an ultrahazardous activity as a matter of law were it not distinguishable; wireline perforation also fails to satisfy the third prong of the Perkins test, which requires the activity to be one that is likely to cause injury to others, even when conducted with the greatest prudence and care. This simply cannot be said of wireline perforation, which is conducted routinely in oilfield drilling, completing, producing, and plugging operations; and in which even the extremely infrequent accident is traceable to substandard human conduct.

The imposition of liability on a principal for acts of an independent contractor is permitted only in narrow circumstances. Like the district court before us, we are not willing to increase the range of circumstances when the courts and legislature of Louisiana have not seen fit to do so. Our pronouncement in *CNG Producing Co.* remains as true today as when it was uttered: "We would not subject this activity to strict liability without certain directions from the Louisiana courts" n81 to which we would add, "or the Legislature."

--Footnotes--

n81 *CNG Producing Co. v. Columbia Gulf Transmission Corp.*, 709 F.2d 959, 962 (5th Cir. 1983).

--EndFootnotes--
[*44]

2. The Article 667 Claim

The Plaintiffs do not make altogether clear whether (1) they assert two completely separate and distinct strict liability claims against Kerr-McGee, one for vicarious tort liability under art. 2315, and another for ownership liability under art. 667 n82; or (2) they assert but one claim, in which they merely seek to analogize art. 667's strict liability for blasting with explosives on the premises with art. 2315's vicarious liability for its independent contractor's wireline perforation with the gun's shaped charges. As the district court made a discrete ruling under art. 667, however, we shall address the Plaintiffs' strict liability charge on the assumption that they asserted such a claim separately under art. 667. When we do so, we discern two distinct reasons why the Plaintiffs cannot recover under art. 667, one substantive and the other jurisdictional.

--Footnotes--

n82 Article 667 provides, in pertinent part:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. ... [The proprietor] is answerable for damages only upon a showing that he knew or ... should have known that his works would cause damage, that the damage could have been prevented .... Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

La. Civ. Code Ann. art. 667 (emphasis added).

--EndFootnotes--

[*45]

The substantive reason should by now be obvious: The foregoing analysis exhaustively demonstrates why downhole wireline perforation for either completing an oil or gas well or plugging and abandoning one does not equate with blasting with explosives. That applies with equal force when that activity is tested under the exclusive list of but two ultrahazardous activities that are exceptions under art. 667, i.e., blasting with explosives and pile driving. As wireline perforation is not a manifestation of blasting with explosives for tort law purposes in Louisiana, that very same activity cannot logically be ultrahazardous for purposes of art. 667. Therefore, injury resulting from wireline perforation operations on Kerr-McGee's premises cannot subject Kerr-McGee, as proprietor, to liability without fault under art. 667, so the Plaintiffs cannot prevail on their claims under that article. Thus they have failed to state a cause of action under that code article.

Second, the Plaintiffs have no right of action under art. 667; jurisdictionally, they do not have standing to sue Kerr-McGee as the "proprietor" of the platform which is not only Kerr-McGee's "estate" but is also the same[*46] immovable on which Roberts was working when he was injured. Roberts was not on adjacent or adjoining property; neither was he a "neighbor" deprived of the enjoyment of his own estate. Yet art. 667 clearly requires those elements to be present for a plaintiff to have standing to sue a "proprietor" for damages caused by even an ultrahazardous activity lawfully conducted on his immovable: The activity on the defendant's premises must damage the neighbor or the neighboring "estate."

Differing from Louisiana's tort doctrine (which is established in arts. 2315 et seq. in Book III Title V, entitled Obligations Arising Without Agreement), art. 667 appears in Book II, Title IV, entitled Predial Servitudes; specifically, in section 1, Limitations of Ownership, of Chapter 3, Legal Servitudes. The basic term, servitude, is not defined in the Civil Code but is generally understood to be an obligation owed by one "estate," referred to as the "servient estate," either to designated persons or to another estate, referred to as the "dominant estate." There are two kinds of servitudes, personal and predial. n83 "A personal servitude is a charge on a thing for the benefit of a person," n84 of which[*47] there are but three: usufruct, habitation, and the right of use. n85 In contrast, a "predial servitude is a charge on a servient estate for the benefit of a dominant estate," which two estates must belong to different owners. n86 The two immovables that constitute the two estates -- dominant and servient -- need not be contiguous or within any given proximity, n87 and the predial servitude itself is an immovable, albeit incorporeal. n88

--Footnotes--

n83 La. Civ. Code Ann. art. 533.

n84 La. Civ. Code Ann. art. 534.

n85 *Id.*

n86 La. Civ. Code Ann. art. 646.

n87 La. Civ. Code Ann. art. 648.

n88 La. Civ. Code Ann. art. 649.

--EndFootnotes--

Among predial servitudes are included (1) natural servitudes, such as drainage, (2) legal servitudes, which are those established by law, and (3) conventional servitudes, which are established by contract. Article 667 is applicable to legal servitudes and covers such obligations of neighborhood as keeping buildings in repair, n89 building projections across property lines, n90 building[*48] encroachments on adjoining property, n91 common walls, n92 and right of passage to and from an enclosed estate. n93 Article 667 is aptly titled "Limitations on use of property."

--Footnotes--

n89 La. Civ. Code Ann. art. 660.

n90 La. Civ. Code Ann. art. 663.

n91 La. Civ. Code Ann. art. 670.

n92 La. Civ. Code Ann. art. 673 et seq.

n93 La. Civ. Code Ann. art. 689 et seq.

--EndFootnotes--

In distinguishing actions under art. 2315 on the one hand and those under arts. 667 and 668 on the other, Professor A. N. Yiannoupoulos has written

> The question arises, therefore, as to the interrelations of articles 2315, 667, and 668. Specifically, does the broadened notion of fault under article 2315 render the notion of liability without negligence under articles 667 and 668 unnecessary? It is submitted that this is not the case: the two sets of provisions may overlap in part but continue to establish distinct grounds of responsibility. Article 2315 establishes responsibility under the law of delictual obligations for all[*49] injuries to persons and property. Articles 667 and 668 establish specifically responsibility for damage to property and persons in the context of neighborhood, namely, under rules of property law. It is conceivable that liability may rest on either ground exclusively or on both cumulatively. Indeed, a plaintiff may satisfy the terms and conditions of both sets of articles and may have two distinct causes of action for a single recovery, one resting on the precepts of the law of obligations and the other on precepts of the law of property; or he may have a cause of action either under article 2315 or under articles 667 and 668.

n94

--Footnotes--

n94 Yiannopoulos, A.N., Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code, 48 TUL. L. REV. 195, 223 (1974).

--EndFootnotes--

Although courts and commentators disagree about the nature of the interest that a plaintiff must have to bring an action under art. 667, all appear to agree that the plaintiff must have some interest in an[*50] immovable near the defendant-proprietor's immovable. For example:

E. Who Can Bring the Action?

To be a "neighbor" one need not be an adjoining landowner; as article 651 says[,] "it suffices that they [the lands] be sufficiently near, for one to derive benefit from the servitude on the other."...Because article 667 appears among those dealing with servitudes, and because article 666 provides that these servitudes are imposed by law "upon the proprietors ... towards one another," it seems clear that the plaintiff must have a property interest.... n95

and,

We find that certain persons other than landowners have the requisite interest to entitle them to institute an action based on Article 667 ....

Because the servitude is established for the benefit of the estate rather than for the owners personally, those who have a proprietary interest in the estate as outlined by Professor Stone have the standing to bring an action under Article 667. n96

and, again,

We are of the further opinion that the word "neighbor" as used in Article 667 is indefinite and refers to any land owner whose property may be damaged irrespective[*51] of the distance his property may be from that of the proprietor whose work caused the damage. n97

To summarize this point, art. 667 authorizes an action by a "neighbor" against the owner of an immovable ("proprietor") for damage that the neighbor suffered by virtue of an activity conducted on the proprietor's premises. To show that he is a "neighbor," and thus legally entitled (standing; right of action) to maintain an art. 667 action, a plaintiff must show some type of ownership interest in immovable property near that of the proprietor.

--Footnotes--

n95 Stone, Ferdinand Fairfax, Tort Doctrine in Louisiana: The Obligations of Neighborhood, 40 TUL. L. REV. 701, 711 (1966) (emphasis added).

n96 *Salter v. B.W.S. Corp.*, 281 So.2d 764, 767-68 (La. App. 3d Cir. 1973) (emphasis added). See also Yiannopolous, *supra* note 94, at 206 ("Articles 667 and 668 seem to involve reciprocal duties among landowners that may be broadly regarded as servitudes imposed by law, namely, as charges laid on an estate in favor of another estate belonging to another owner.") (emphasis added).

[*52]

n97 *Gulf Insurance Co. v. Employers Liability Assurance Corp.*, 170 So.2d 125, 129 (La. App. 4th Cir. 1964).

--EndFootnotes--

In completing this analysis, we note that, in 1977, Louisiana's legislature amended portions of the Civil Code pertinent to this analysis. Prior to the amendment, art. 666 provided that legal servitudes (including art. 667) were imposed by law "upon the proprietors...towards one another." Following the amendment, arts. 664 and 666 were condensed to form the new art. 659, n98 which states: "Legal servitudes are limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons." This amendment on its face makes it less clear that one must have some type of immovable property interest to maintain an action under art. 667; the official revision Comment provides, however, that new art. 659 is based on art. 664 of the Louisiana Civil Code of 1870, and "does not change the law."

--Footnotes--

n98 Table 2-Derivation, La. Civ. Code Ann. Vol. 3A, p. XXIX.

--EndFootnotes--

[*53]

Nevertheless, to confirm our conclusion that there has been no change in interpretation, i.e., that the revisions did not strip away the requirement that a plaintiff have some type of immovable property interest, we turn to post-amendment court and commentator treatments of art. 667. Our review of these serves to satisfy us that there has been no such change. Professor Yiannopoulos still writes:

> Literally, Articles 667 and 668 apply to "proprietors," namely, landowners .... By virtue of an expansive interpretation, any person assuming the position of owner, usufructuary, possessor in good or bad faith, or long term lessee, may qualify as a proprietor ....
>
> Persons that do not qualify as proprietors, such as guests, contractors, and members of the public, may have a variety of remedies against a landowner under the law of delictual obligations or under Article 669, but not for violation of obligations established by Articles 667 and 668. n99

And the courts of Louisiana continue to agree. n100

--Footnotes--

n99 4 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, Predial Servitudes, § 44: Proprietors and Other Persons, pp. 125-26 (2d ed. 1997).

[*54]

n100 See, e.g., *Dumas v. Angus Chemical Co.*, 728 So.2d 441, 451 (La.App. 2 Cir. 1999) (citing the above-referenced excerpt from YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE in denying that persons injured by an explosion on the premises of a fertilizer plant could recover against the plant operator under Art. 667).

--EndFootnotes--

In summary, then, the Plaintiffs are precluded both procedurally and substantively from recovering against Kerr-McGee under art. 667. Procedurally, they have no standing or right of action to sue Kerr-McGee under art. 667 as owner of the platform, an immovable that is the servient estate in this instance, because art. 667 creates obligations in favor of proprietors who are neighbors and thus enjoy the position of the dominant estate of the predial servitude of neighborliness created by this section of the Civil Code. Roberts, a non-proprietor, incurred his injuries while he was physically present on the servient estate, not on a dominant one; and his injuries resulted from the proprietor's lawful use of his estate. Conversely, none [illegible] the Plaintiffs is owed a duty[*55] by virtue of ownership or presence on an adjacent or proximate dominant estate, and therefore they cannot ground their claims against Kerr-McGee in any aspect of predial servitudes in general or art. 667 in particular.

Substantively, the Plaintiffs are precluded from recovery under art. 667. First, they have not attempted to demonstrate -- nor could they -- that Kerr-McGee "knew or, in the exercise of reasonable care, should have known that [its] works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that [it] failed to exercise such reasonable care." Second, absent knowledge and ability to prevent, Kerr-McGee could only be answerable for damages if the injuries were caused by ultrahazardous activity which, for purposes of art. 667, is "strictly limited to pile driving or blasting with explosives." n101 And, as the district court correctly determined, use of a wireline perforating gun in the course of plugging and abandoning an oil or gas well is not a manifestation of blasting with explosives.

--Footnotes--

n101 La. Civ. Code Ann. art. 667.

--EndFootnotes--

[*56]

III. Conclusion

Our review of the summary judgment record in this case and the legal propositions advanced by counsel in their appellate briefs and in their arguments before us, together with our consideration of the reasoning of the district court, satisfies us that the court (1) correctly applied the appropriate test in denying seaman status to Roberts in his Jones Act claim against Cardinal, and (2) correctly determined that wireline perforation, as a common and customary activity in the petroleum industry -- including use in connection with plugging and abandoning oil and gas wells -- is distinguishable from blasting with explosives, and is not an ultrahazardous activity for purposes of either vicarious liability and negligence under Louisiana tort law or strict liability of an owner of an immovable for damage to his neighbors under art. 667 of the Louisiana Civil Code. The district court's grants of summary judgment in favor of Cardinal and Kerr-McGee are, therefore,

AFFIRMED.

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED OCTOBER 16, 2000 AND ENTERED ON OCTOBER 18, 2000

RUSTY ROBERTS VERSUS CARDINAL SERVICES, INC. ET AL
CIVIL ACTION NO. 99-430 SECTION "N"
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2000 U.S. Dist. LEXIS 15631
October 16, 2000, Decided
October 18, 2000, Filed, Entered

DISPOSITION: [*1] Defendant Cardinal Services, Inc.'s Motion for Summary Judgment GRANTED.

COUNSEL: For RUSTY ROBERTS, SANDRA - ROBERTS, plaintiffs: Charles Arlen Braud, II, Michelle O. Gallagher, C. Arlen Braud & Associates, L.L.C., Madisonville, LA.

For RUSTY ROBERTS, plaintiff: Bart A. Broussard, C. Arlen Braud & Associates, L.L.C., Madisonville, LA.

For RUSTY ROBERTS, plaintiff: Joshua Atwood Tilton, The Tilton Law Firm, Mt. Hermon, LA.

For CARDINAL SERVICES, INC., defendant: Elton Ford Duncan, III, Kelley A. Sevin, Duncan & Courington, LLC, New Orleans, LA.

JUDGES: EDITH BROWN CLEMENT, UNITED STATES DISTRICT JUDGE.

OPINION: ORDER AND REASONS

Before the Court is defendant Cardinal Services, Inc.'s Motion for Summary Judgment. For the following reasons, defendant's motion is GRANTED.

BACKGROUND

In April 1998, Oryx Energy Company ("Oryx") hired defendant Cardinal Services, Inc. ("Cardinal") to plug and abandon its wells on a platform off the Louisiana coast. Plaintiff Rusty Roberts, a Cardinal employee, served as the pump operator for this job. Plug and abandon ("P&A") work involves the decommissioning of oil wells under offshore platforms. Most of Cardinal's P&A [*2]work is done from fixed platforms; but other projects, including several of Mr. Roberts' assignments, are performed partly from liftboats, support vessels that use cranes to raise the well casing. The vessel transports Cardinal's equipment to the platforms and also provides the crew with a place to eat and sleep.

On May 21, 1998, when Cardinal employees were perforating a well on Oryx's platform, the perforation gun discharged while Roberts was standing next to it. Roberts has brought suit against Cardinal under the Jones Act, *46 U.S.C. § 688,* for injuries sustained in this explosion. Cardinal now moves for summary judgment on Mr. Roberts' claims, alleging that he is not a seaman within the meaning of the Act.

LAW AND ANALYSIS

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A genuine issue of fact exists where the evidence is such that a reasonable jury could return a verdict for the non-moving party. [*3] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The party seeking summary judgment bears the burden of demonstrating an absence of evidence to support the non-movant's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the opposing party bears the burden of proof at trial, the moving party need not submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. See *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991). To oppose a motion for summary judgment, the non-movant must set forth specific facts to establish a genuine issue of material fact and cannot merely rest on allegations and denials. See *Celotex*, 477 U.S. at 324. Factual controversies are to be resolved in favor of the non-moving party. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

The determination of whether an injured worker is a seaman under the Jones Act "is a mixed question[*4] of law and fact, and it often will be inappropriate to take the question from the jury." *Harvard [sic.] Tug and Barge Co. v. Papai*, 520 U.S. 548, 554, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997). Nevertheless, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." Id. (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991)).

The Supreme Court has established a two part test to determine seaman status: First, an employee's duties must contribute to the function of a vessel or to the accomplishment of its mission. Second, a seaman must have a connection to a vessel in navigation or to an identifiable group of such vessels that is substantial in terms of both its duration and its nature. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995). In applying the Chandris test, all relevant circumstances of the employee's situation must be considered. See *id. at 369*. The employee bears the burden of establishing seaman status. *In re Falcon Inland, Inc.*, 1998 U.S. Dist. LEXIS 8591, 1998 WL 290214,[*5] at *1 (E.D.La. June 3, 1998).

Cardinal alleges that Mr. Roberts fails to meet either factor of the Chandris test. First, Cardinal asserts that Mr. Roberts did not contribute to the function of the vessel or to the accomplishment of its mission. However, Mr. Roberts has submitted evidence that he was required to work as a deckhand on Cardinal liftboats during P&A operations. See Beard Aff. at P 6. Accordingly, the Court finds a genuine issue of material fact exists as to whether Mr. Roberts' duties contribute to the function of a vessel or to the accomplishment of its mission.

Cardinal also asserts that Mr. Roberts does not have a substantial connection to a vessel or group of vessels. It is undisputed that Mr. Roberts was not permanently assigned to any one vessel in navigation. Rather, he contends that he was a member of the crews of several liftboats used in plug and abandonment jobs performed by Cardinal, and that these boats constitute an identifiable fleet of vessels. Thus, the issue before the Court is whether Mr. Roberts "has produced sufficient evidence to create a genuine fact issue as to whether he had a substantial connection to a group of vessels acting together[*6] under common ownership or control." *St. Romain v. Industrial Fabrication and Repair Serv., Inc.*, 203 F.3d 376, 379 (5th Cir. 2000).

In St. Romain the Fifth Circuit denied seaman status to a P&A worker because he did not establish that he worked aboard an identifiable fleet of vessels. The plaintiff in St. Romain was a P&A helper employed by Superior Well Service, Inc. Most of his work was performed on fixed oil platforms, but he also worked aboard nine different liftboats that were hired by the oil company that contracted with Superior. Since these liftboats were not controlled by any single entity, the Fifth Circuit held that the plaintiff did not have a substantial connection to a vessel or group of vessels, and was not a seaman under the Jones Act.

Mr. Roberts asserts that he performed approximately 41.31% of his P&A work on liftboats. These boats were either owned by Cardinal or leased from third parties. Like the plaintiff in St. Romain, Mr. Roberts does not have a substantial connection to the third party vessels. However, Cardinal's liftboats constitute an identifiable fleet of vessels because they are subject to common ownership or control. Accordingly, [*7] if Mr. Roberts can demonstrate that he spent an adequate amount of time on Cardinal liftboats, he can establish a substantial connection to a vessel or group of vessels acting together under common ownership or control.

The Supreme Court has held that "a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman." *Chandris*, 515 U.S. at 349. According to his work records, Mr. Roberts only spent 24.88% of his time assigned to Cardinal boats. See Daily Operation Reports and Time Cards. Mr. Roberts alleges that his work records are in error, and in his deposition on October 4, 1999, he states that three projects billed as platform jobs were actually performed on Cardinal liftboats. See Roberts Aff. at 206-248. However, Mr. Roberts offers nothing to support his conclusions. Cardinal has submitted invoices for each of these three jobs, and none of the invoices indicate that a Cardinal liftboat was used. See Invoice Nos. 586510, 593162, and 591983. "Conclusory statements in an affidavit do not provide facts that will counter summary judgment evidence, and testimony based on conjecture alone[*8] is insufficient to raise an issue to defeat summary judgment." *Lechuga v. Southern Pacific Transportation Co.*, 949 F.2d 790, 798 (5th Cir. 1992). Mr. Roberts' statements in his deposition are conclusory and unspecific, and as such "are inadequate to raise a genuine issue of fact." Id.

Because the evidence clearly proves that Roberts had an inadequate temporal connection to a vessel, it is appropriate for the Court to take the determination of seaman status from the jury. See *Chandris*, 515 U.S. at 349. Accordingly, since Mr. Roberts has not spent a sufficient amount of time on a vessel or group of vessels under common ownership or control, the Court finds that he is not a seaman under the Jones Act.

CONCLUSION

Because Mr. Roberts is not a seaman under the Jones Act, defendant Cardinal Services, Inc.'s Motion for Summary Judgment is GRANTED.

New Orleans, Louisiana, this 16 day of October, 2000.

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

APPENDIX C – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED SEPTEMBER 13, 2000 AND ENTERED ON SEPTEMBER 13, 2000

RUSTY ROBERTS VERSUS CARDINAL SERVICES, INC., ET AL
CIVIL ACTION NO. 99-430 SECTION "N"
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OFLOUISIANA
2000 U.S. Dist. LEXIS 13690
September 13, 2000, Decided
September 13, 2000, Filed, Entered

DISPOSITION: [*1] Defendant Kerr-McGee's Motion for Summary Judgment on all of plaintiff Rusty Roberts' claims GRANTED; and defendant Kerr-McGee's Motion in Limine to Strike Expert Testimony DENIED AS MOOT.

COUNSEL: For RUSTY ROBERTS, SANDRA - ROBERTS, plaintiffs: Charles Arlen Braud, II, Bart A. Broussard, Michelle O. Gallagher, C. Arlen Braud & Associates, L.L.C., Madisonville, LA.

For RUSTY ROBERTS, plaintiff: Joshua Atwood Tilton, The Tilton Law Firm, Mt. Hermon, LA.

For CARDINAL SERVICES, INC., defendant: Elton Ford Duncan, III, Kelley A. Sevin, Duncan & Courington, LLC, New Orleans, LA.

For KERR-MCGEE CORPORATION, defendant: Robert Allan Vosbein, Robert A. Vosbein, Jr., Adams & Reese, New Orleans, LA.

JUDGES: EDITH BROWN CLEMENT, UNITED STATES DISTRICT JUDGE.

OPINION: ORDER AND REASONS

Before the Court are Defendant Kerr-McGee's (1) Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment and (2) Motion in Limine to Strike Expert Testimony. For the following reasons, defendant's Motion for Summary Judgment is GRANTED and its Motion is Limine is DENIED AS MOOT.

BACKGROUND

In April 1998, Oryx Energy Company ("Oryx") hired Cardinal Services, [*2] Inc. ("Cardinal") to plug and abandon its wells on a platform off the Louisiana coast. Cardinal, an independent contractor, would control, direct and maintain responsibility for the project. Oryx only reserved the right to observe and inspect Cardinal's work to ensure its satisfactory completion. Plaintiff Rusty Roberts, a Cardinal employee, served as the pump operator for this job.

On May 21, 1998, while Cardinal employees were perforating a well on Oryx's platform, the perforation gun discharged while Roberts was standing next to it. Roberts has sued Cardinal and Kerr-McGee Corporation ("Kerr-McGee"), Oryx's successor in interest, for damages sustained in this explosion. Kerr-McGee now moves the Court to dismiss all the claims Roberts filed against it. In addition, Kerr-McGee moves the Court to exclude the expert testimony of several of Roberts' treating physicians.

I. MOTION FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment[*3] as a matter of law." FED. R. CIV. P. 56(c). A genuine issue of fact exists where the evidence is such that a reasonable jury could return a verdict for the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L.

Ed. 2d 202, 106 S. Ct. 2505 (1986). The party seeking summary judgment bears the burden of demonstrating an absence of evidence to support the non-movant's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the opposing party bears the burden of proof at trial, the moving party need not submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. See *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991). To oppose a motion for summary judgment, the non-movant must set forth specific facts to establish a genuine issue of material fact and cannot merely rest on allegations and denials. See *Celotex*, 477 U.S. at 324. Factual controversies are to be resolved in favor of the non-moving party. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).[*4]

B. LAW AND ANALYSIS

Roberts seeks damages under theories of premises liability pursuant to Louisiana Civil Code articles 2317.1 and 2322, negligence pursuant to article 2315, and strict liability pursuant to article 667. Kerr-McGee moves for summary judgment on all these claims.

1. Premises Liability

Kerr-McGee first moves to dismiss Roberts' premises liability claims brought under Louisiana Civil Code articles 2317.1 and 2322. Roberts does not oppose defendant's motion for summary judgment on these issues. See Mem. Opp. at 1. Accordingly, Kerr-McGee's motion for summary judgment on Roberts' premises liability claims is GRANTED.

2. Negligence

Roberts also asserts that Kerr-McGee is liable in negligence for his injuries under Louisiana Civil Code article 2315. However, a principal such as Oryx cannot be held liable for injuries resulting from the allegedly negligent acts of an independent contractor such as Cardinal, "unless (1) the liability arises from ultrahazardous activities performed by the contractor on behalf of the principal or (2) the principal retains operational control over the contractor's acts or expressly or impliedly authorizes those acts." *Coulter v. Texaco, Inc.*, 117 F.3d 909, 911-12 (5th Cir. 1997).[*5] Roberts admits that Oryx did not maintain operational control over Cardinal's crew. Therefore, Kerr-McGee is only liable if perforation is an ultrahazardous activity. Whether an activity qualifies as ultrahazardous in Louisiana is a question of law. See *Ainsworth v. Shell Offshore, Inc., 829 F.2d 548, 550 (5th Cir. 1987).*

A wireline perforating gun uses explosive charges to blast holes in the sides of an oil well. The wireline crew attaches the gun to the end of a long cable, the wireline, and lowers the gun into the well. When the gun reaches the desired depth, a blasting cap detonates charges which perforate the well. Roberts was injured when the blasting cap accidentally detonated on the platform.

The Fifth Circuit holds that an activity is ultrahazardous if (1) the activity relates to an immovable, (2) the activity itself causes the injury and the defendant is directly engaged in the activity, and (3) the activity does not require the substandard conduct of a third party to cause injury. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1267-68 (5th Cir. 1985).

The first two prongs of the this test are satisfied in the case at bar. First, [*6] Kerr-McGee admits that wireline perforation relates to an immovable. Secondly, Roberts was directly injured by the accidental firing of a perforation gun. Furthermore, since perforation is an indispensable element of Kerr-McGee's well-drilling business, the Court finds that Kerr-McGee is directly engaged in the activity that allegedly caused Roberts' injury. See *Bergeron v. Blake Drilling and Workover Co., Inc.*, 599 So.2d 827, 833 (La. App. 1 Cir. 3/31/1992) (stating that a "well cannot produce oil or gas unless it is perforated" and "perforation is an internal and indispensable element of every well"); *Anderson-Prichard Oil Corp. v. Parker*, 245 F.2d 831, 835 (10th Cir. 1957) (stating that perforation of the casing is a "common practice during the drilling of an oil and gas well...").

The determination of whether wireline perforation is an ultrahazardous activity depends on the third factor of the test: whether it requires "the substandard conduct of a third party to cause injury." *Perkins*, 762 F.2d at 1268. In other words, wireline perforation is ultrahazardous if it "can cause injury to others, even when conducted with the greatest[*7] prudence and care." *Perkins*, 762 F.2d at 1268, (quoting *Kent v. Gulf States Utilities Co.*, 418 So.2d 493, 498 (La. 1982)). See also *O'Neal v. Int'l Paper Co.*, 715 F.2d 199, 202 (5th Cir. 1983)(holding that ultrahazardous activities present "a risk of harm that cannot be eliminated through the exercise of due care").

Roberts cites *Bergeron v. Blake Drilling and Workover Co., Inc.*, 599 So.2d 827, 839 (La. App. 1 Cir. 3/31/1992) for the proposition that wireline perforation is an ultrahazardous activity because "there is a period of time during perforating when safety procedures are of no moment." The court ruled that the "uncertainty of the safety procedures combined with the fact that the intended use of the charges of the perforating gun is to explode, leads us to no other conclusion but that perforating is an intrinsically and inherently dangerous work." Id.

However, the *Bergeron* court did not explicitly find that wireline perforation is ultrahazardous. The Bergeron court ultimately held that "even if one found that perforating was not ultrahazardous, a finding that perforating is an inherently and[*8] intrinsically dangerous work is unavoidable." *Id. at 839*. By holding Kerr-McGee liable under article 2315 for "inherently dangerous" activity, this Court would be expanding the Louisiana Supreme Court's policy behind ultrahazardous activity as announced in *Kent v. Gulf States Utilities Co.*, 418 So.2d 493 (La. 1982). In *Kent*, the Louisiana Supreme Court held that the ultrahazardous activity classification "was created for the rare instances in which the activity can cause injury to others, even when conducted with the greatest prudence and care." *Id.* at 498. This Court does not find that an "inherently dangerous" activity fits within the "special category" of ultrahazardous liability. Id.

Furthermore, holding that perforation is ultrahazardous conflicts with the Fifth Circuit's determination that drilling operations are not ultrahazardous. See *Ainsworth,* 829 F.2d at 550, see also *Crosby v. Texaco Inc.*, 1994 U.S. Dist. LEXIS 12698, 1994 WL 495786, *1 (E.D.La.)(citing Ainsworth for the proposition that drilling operations are not ultrahazardous). Since perforation has long been an "internal and indispensable[*9] element" of drilling for oil, *Bergeron*, 599 So.2d at 840, the Court finds that perforation is encompassed within the Fifth Circuit's definition of "drilling operations" for the purpose of determining an ultrahazardous activity.

Finally, an ultrahazardous activity is one that "by its definition cannot be conducted safely." *Touchstone v. G.B.Q. Corp.*, 596 F.Supp. 805, 814 (E.D.La. 1984)(Sear, J.). As an essential component of the drilling process, wireline perforation is a "common activity in the oil field industry, occurring more than 100 times a day on a worldwide basis. Given the number of perforating operations, accidents are rare." *Bergeron*, 599 So.2d at 833. In light of this information, this Court cannot accept the Bergeron court's conclusion that "perforation is an ultrahazardous activity and/or an intrinsically dangerous activity" that cannot be performed safely. *Id.* Considering the frequency of the activity, the scarcity of accidents, and Roberts' own allegation that Cardinal's negligence caused his injury, the Court finds that wireline perforation can indeed be done safely.

Since the Fifth Circuit has held that[*10] drilling operations are not ultrahazardous, since Louisiana courts have found that perforation is a routine part of the drilling process, and since this Court has determined that perforation can be performed safely, the Court finds that perforation is not an ultrahazardous activity. Accordingly, Kerr-McGee's Motion for Summary Judgment on Roberts' La. Civ. Code art. 2315 claim is GRANTED.

3. Strict Liability

Finally, Roberts alleges that Kerr-McGee is strictly liable under Article 667 of the Louisiana Civil Code, which provides that a "proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity." LA. CIV. CODE ANN. art. 667 (West 1980). As explained above, the Court finds that wireline perforation is not an ultrahazardous activity. The Fifth Circuit in Perkins held that the "Louisiana doctrine of ultrahazardous activities has its roots in arts. 667-669 of the Civil Code" and that ultrahazardous liability under art. 2315 is analogous to that under art. 667. *Perkins*, 762 F.2d at 1266. In light of this holding, the Court finds that wireline perforation is not ultrahazardous [*11]within the meaning of art. 667. Accordingly, Kerr-McGee's motion for summary judgment on Roberts' claim under La. Civ. Code art. 667 is GRANTED.

II. MOTION IN LIMINE

Kerr-McGee also moves to strike the testimony of Roberts' treating physicians, whom Roberts has listed as expert witnesses. Since the Court has dismissed all of Roberts' claims against Kerr-McGee, Kerr-McGee's Motion in Limine is DENIED AS MOOT.

CONCLUSION

IT IS ORDERED that

(1) defendant Kerr-McGee's Motion for Summary Judgment on all of plaintiff Rusty Roberts' claims is GRANTED; and

(2) defendant Kerr-McGee's Motion in Limine to Strike Expert Testimony is DENIED AS MOOT.

New Orleans, Louisiana, this 13 day of September, 2000.

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

APPENDIX D – SELECTION FROM OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, R-001708-09 – CHART OF VESSELS AND INCLUSIVE DATES OF SERVICE

Rusty Roberts did have a connection with an identifiable group of vessels. 67.21 % of Mr. Roberts vessel time was spent aboard vessels owned by Cardinal Services, Inc. Accordingly, the majority of his time was spent aboard vessels owned by Cardinal.

Vesssel	Hours	Percentage
Cardinal Fleet	1,570	67.21
Third Party Vessel	766	32.79%
Total Vessel Time	2336	100.00%

Of the various offshore assignments, only two involve liftboats not owned by Cardinal.Specifically, Cardinal did not own the L/B RAYA or the L/B MR FRANK See Defendant's Exhibit 2, affidavit of Bobby Lott, No. 23. The remaining assignments were performed on Cardinal vessels.

The following chart is a list of work performed by Rusty Roberts on Cardinal vessels.

ASSIGNMENTS ON CARDINAL VESSELS

	DATES	CARDINAL VESSEL
1	7/21/97 - 7/27/97	D.H. Holmes
2	7/28/97 - 8/6/97	D.H. Holmes
3	9/28/97 - 10/6/97	E.J. Henry
4	12/10/97 - 12/22/97	C.G. Hentze
5	11/22/97 - 11/23/97	Cardinal Barge
6	12/31/97 - 1/3/98	E.J. Henry
7	1/8/98 - 1/12/98	E.J. Henry
8	1/26/98 - 2/14/98	E.J. Henry
9	3/3/98 - 3/10/98	E.J. Henry
10	4/6/98 - 4/10/98	J.N. Mitchell
11	4/15/98 - 4/16/98	Cardinal Barge
12	4/19/98 - 4/28/98	P.J. Richard
13	5/2/98 - 5/5/98	RE. Johnson

R. 001708-1709 (Excerpts)

(2)

Supreme Court, U.S.
FILED

FEB 19 2002

CLERK

No. 01-1062

In The

Supreme Court of The United States

RUSTY ROBERTS, ET AL
Petitioners
v.

CARDINAL SERVICES, INC., ET AL
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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1988

QUESTION PRESENTED FOR REVIEW

In determining seaman status under the Jones Act, 46 U.S.C. § 688, does the 30% guideline for determining substantial duration as annunciated in *Chandris* apply to an identifiable group of vessels which are subject to common ownership or control?

INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of this case:

Cardinal Services, Inc.

Superior Energy Services, L.L.C.

Sandy Roberts and Rusty Roberts, individually and on behalf of their minor children, Chase and Jarod Roberts.

Kerr-McGee Corporation, Oryx Energy Company successor in interest, was a defendant in the District Court and Appellee in the Court of Appeal but has no interest in the matters addressed in the Petition for Writ of Certiorari.

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Respondent, Superior Energy Services, L.L.C., is affiliated with the following corporation:

Superior Energy Services Corporation

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 266 F.3d 368 (5th Cir. 2001) and is reproduced at Appendix A-1a to the Petition for Writ of Certiorari. The District Court for the Eastern District of Louisiana opinion appears at 2000 W.L. 1560045 (E.D. La.) and is reproduced at Appendix B-38a to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals was rendered on October 2, 2001. There was no application for rehearing. Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1) and § 2101(c).

STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. § 688, provides in relevant part:

> "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury..., and in such action, all statutes of the United States, modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

STATEMENT OF THE CASE

Petitioner, Rusty Roberts, was employed by Cardinal Services, Inc. n/k/a Superior Energy Services, L.L.C. for approximately nineteen (19) months.[1] Mr. Roberts was hired as a plug and abandonment helper and was later promoted to a plug and abandonment operator.[2] Cardinal provides a wide range of oilfield services to the energy industry in Louisiana and Texas as well as in the Gulf of Mexico offshore those states.[3] Cardinal's services are performed on land and on fixed platforms in the Gulf of Mexico.

Plug and abandonment (P&A) work is not limited to wells offshore but is also performed on land-based oil and gas wells once it is determined the wells are to be decommissioned. Petitioner's statement, "Since there are no mud lines or such bodies of water on land, this work is necessarily entirely maritime in nature..."[4] is not correct and is not supported by the lower court record.

During Mr. Roberts' nineteen (19) month employment, Mr. Roberts' job location was customer driven. The majority of Mr. Roberts' employment (58.69% of his entire employment with Cardinal) was spent strictly in connection with work on wellheads on platforms where no vessel was involved or in work on land in the Cardinal shop or yard. (Tr.R. 945, 954, 958, 968-1606). The Cardinal Daily Operation Reports which were produced, identified and made part of the record below, describe and account for every hour of Mr. Roberts' employment as a Cardinal plug and abandonment helper and operator, which describes Mr. Roberts' employment with Cardinal as performing P&A work to *oil* and *gas wells,* not vessels. (Tr.R. 941-1606).

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[1] Cardinal Services, Inc. merged with Superior Energy Services, L.L.C. while this matter was in litigation. The Respondent will hereinafter be referred to as "Cardinal."

[2] Many of the facts contained in Petitioner's Petition for Writ of Certiorari are not accurate and not supported by the lower court record. Respondent addresses these inaccuracies and refers the Court to the Findings of Fact as stated in the Fifth Circuit's Opinion, *Roberts, et al v. Cardinal Services, Inc., et al,* 266 F.3d 368, 371-373.

[3] *Roberts, et al v. Cardinal Services, Inc., et al,* 266 F.3d, 368, 371.

[4] *Roberts,* Petition for Writ of Certiorari at 4, (No. 01-1062).

On those occasions where Mr. Roberts worked other than on a fixed platform where no vessel was involved or in the Cardinal shop or yard, he still performed strictly P&A operator duties and never worked as a crew member of any vessel. (Tr.R. 857, 864, 877, 880, 881, 913, 932. 938(b), 939). Petitioner ignores the substantial time Mr. Roberts spent working on land, in the shop and on fixed platforms with no liftboat involved on the job. Furthermore, reference to Mr. Roberts as an "offshore construction worker" is inaccurate. It was undisputed in the lower court that the work of P&A employees was to shut down and plug oil and gas wells. (Tr.R. 838, 880, 912(b), 913, 916).

Mr. Roberts spent 21.45 percent of his time in a shop on land, 37.24 percent of his time performing P&A work on platforms with no vessel involvement, 13.54 percent of his time performing P&A work on platforms with third-party vessels alongside, 24.88 percent of his time performing P&A work on platforms with a Cardinal liftboat alongside, 1.99 percent of his time in transit on Cardinal vessels, and .9 percent of this time performing P&A work on the CARDINAL 1, a Cardinal-owned vessel.[5]

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[5] *Id.* at 266 F.3d at 376.

If there was a need for living quarters with food services or additional space on a well site for equipment, the Cardinal P&A department or its customer would make arrangements for a lift boat to be used. (Tr.R. 912(b)). Whether a Cardinal lift boat or a third party lift boat was used on a job was determined by the needs of the customer and not by any particular Cardinal policy. Petitioner's argument that Cardinal had a "change in the employer's method of working" by using its own vessels, as opposed to third party vessels, is *non sequitur.* This does not create a "new assignment" for Mr. Roberts as his duties as a P&A employee never changed during his entire tenure with Cardinal. (Tr.R. 880, 912(b) and 913.

If a lift boat was used, it would be jacked up adjacent to the platform and would remain stationary until the P&A job was completed. (Tr.R. 936(b)). On each of those occasions, the lift boat had its own marine crew, which was completely separate and apart from the plug and abandonment crew, which Mr. Roberts was assigned. (Tr.R. 938(b), 939). Furthermore, this argument was never raised in the lower court or to the Fifth Circuit nor is there any evidence in the record to support this contention.

PROCEEDINGS BELOW

The district court granted Cardinal's Motion for Summary Judgment "because the evidence clearly proves that Mr. Roberts had an inadequate temporal connection to a vessel" and is not a seaman under the Jones Act.[6] The Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment and held "when a group of vessels is at issue, a worker who aspires to seaman status must show at least 30 percent of his time was spent on vessels, everyone of which was under his defendant-employer's common ownership or control."[7]

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[6] *Roberts, et al v. Cardinal, et al,* 2000 W.L. 1560045 *2 (E.D. La.).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. No Conflict with the United States Supreme Court

Review of the Fifth Circuit's decision discloses the Fifth Circuit properly relied upon and quoted the jurisprudence of this Honorable Court as stated in *Papai*[8], *Chandris*[9] and *Wilander.*[10] Petitioner's argument would have this Court overlook or disregard entirely the requirement of a substantial connection to a vessel or identifiable fleet of vessels for Jones Act seaman status. Clearly, this is not the law or the appropriate standard. The Fifth Circuit's ruling should be affirmed as being based on the proper legal test announced by this Court.

The inquiry in determining seaman status for Jones Act purposes as stated by the Fifth Circuit and as set forth by this Court in *Chandris* is as follows:

> First,...an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission.'... Second, and most important for our purpose here, a seaman must have a connection to a vessel in navigation (or to an

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[7] *Roberts*, 266 F.3d at 377.

[8] *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548, 117 S.Ct. 1535 (1997).

[9] *Chandris, Inc., et al v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995).

[10] *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, (1991).

> identifiable group of such vessels) that is substantial in terms of both its duration and nature.[11]

The Fifth Circuit in *Roberts* then set forth the purpose of the test stated by this Court in *Chandris* and reaffirmed in *Papai* is to:

> Separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.[12]

The Fifth Circuit in *Roberts* explained and followed this Court's instruction in *Chandris* determining whether a worker's connection to a vessel is substantial in duration: "A worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[13]

This Court has not indicated that the 30 percent threshold for determining substantial temporal connection should not be applied regardless of whether a worker has connection with one vessel or several vessels. The Fifth Circuit explained that the "30 percent floor does not change when an 'identifiable group' of vessels in navigation is at issue, rather than just one vessel."[14] As indicated by the Fifth Circuit, this Court has given the following instruction on how to determine if there is an identifiable group of vessels:

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[11] *Roberts*, 266 F.3d at 374 quoting *Chandris*, 515 U.S. at 355-56.

[12] *Id.* at 374, quoting *Chandris*, 515 U.S. at 368; see also *Papai*, 520 U.S. at 560; *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 (5th Cir. 1999).

[13] *Id.* at 375, quoting *Chandris*, 515 U.S. at 368.

[14] *Id.* at 375.

> In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman-status determination, the question is whether the vessels are subject to common ownership or control.[15]

Petitioner has not indicated how the Fifth Circuit's opinion conflicts with any decision by this Court. The Fifth Circuit was correct in determining that when a "group of vessels is at issue, a worker who aspires to seaman status must show that at least 30 percent of his time was spent on vessels, every one of which was under his defendant-employer's common ownership or control."[16]

Unlike the suggestion of the Petitioner, the Fifth Circuit acknowledged and correctly explained why a departure from the Court's 30 percent guideline as allowed in *Chandris* would not be justified in this instance.[17] In *Wisner v. Professional Divers of New Orleans*,[18] the Louisiana Supreme Court reversed a grant of summary judgment against a commercial diver even though he did not have a substantial connection to a fleet under common ownership or control because the diver 'faced regular exposure to the perils of the sea.'[19] Contrary to the Petitioner's position, "perils of the sea" or seaman's risk is not outcome determinative of seaman status.[20]

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[15] *Id.* at 376, citing *Papai,* 520 U.S. at 556-557, quoting *Chandris,* 515 U.S. at 366, (emphasis added) (internal citations omitted).

[16] *Roberts,* 266 F.3d at 377.

[17] *Id.* at 377-378.

[18] *Wisner v. Professional Divers of New Orleans,* 731 So.2d 200 (La. 1999).

[19] *Roberts,* 266 F.3d at 377 quoting *Wisner,* 731 So.2d at 202.

The Fifth Circuit reasoned:

> Even though a professional diver is peculiarly- and totally-subject to the perils of the sea and thus may, under special circumstances, qualify as a seaman without showing the requisite degree of temporal connection, a p&a crewman, who practices 'an art developed in land work and transposed to a maritime setting,' cannot.[21]

There is no conflict with this Court's precedent with the Fifth Circuit's refusal to depart from the requirement of a worker having a substantial connection to a fleet under common ownership or control when the worker does not perform traditional maritime activities which subject him to the perils of the sea.

B. No Conflict with Other Circuits

The Petitioner alleges the Fifth Circuit opinion is in conflict with Third Circuit, Second Circuit and the Louisiana Supreme Court "by its unwavering insistence on the application of the thirty percent test as the minimum time having been spent on employer owned vessels without analysis of the entire circumstances of the employment of the putative seaman, here petitioner."[22] Petitioner does not give any analysis explaining how a conflict exists between the Fifth, Third and Second Circuits, but rather simply cites two cases.

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[20] *Chandris,* 515 U.S. at 361-362.

[21] *Roberts,* 266 F.3d at 378.

[22] *Roberts,* Petition for Writ of Certiorari at 5, (No. 01-1062).

Petitioner refers to the Third Circuit Court of Appeals decision in *Shade v. Great Lakes Dredge and Dock Co.,* 154 F.3d. 143 (3rd Cir. 1998) for the proposition that this case is in conflict with the Fifth Circuit decision in *Roberts*. In *Shade,* an injured employee sued his employer, Great Lakes Dredge and Dock Co., a dredging contractor, for damages under the Jones Act. Great Lakes had previously employed Shade from September 1992 until February 1994. Beginning in March, 1994 Shade worked for Bean-Weeks Joint Venture, another dredging contractor, as a deckhand. Bean-Weeks subsequently fired Shade and he remained without work until Great Lakes rehired him in December, 1994 and was subsequently injured.[23]

The Third Circuit articulated the issue as follows:

> "Thus, in this unusual situation, we must determine whether the fleet seaman doctrine permits Shade to aggregate his prior assignment with Great Lakes and his work for the company at the Cape May job to establish a substantial connection to a vessel in navigation even though he was not employed continuously by Great Lakes."[24]

The Third Circuit in *Shade* referred to the jurisprudence set by this Court in *Papai*. In *Papai,* prior assignments could not be used to establish seaman status because they were separate from

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[23] *Shade,* 154 F.3d at 145-146.

[24] *Id.* at 152-153.

Papai's present employment. Contrary to the Petitioner's suggestion, the Third Circuit referred to the Fifth Circuit Court of Appeals decision in *Patten-Tulley Transp. Co. v. Ratliff,* 797 F.2d 206 (5th Cir. 1986), wherein the Fifth Circuit upheld the exclusion of evidence of a prior employment with the same employer because the employee had not worked with the employer on a continuous basis.[25]

The *Shade* Court held that evidence of an employee's prior assignment with the same employer is not admissible under the fleet seaman doctrine if those assignments were not part of a continuous employment relationship between the employee and employer.[26] The Second Circuit stated that "even though the fleet seaman doctrine permits an employee to aggregate contacts with multiple vessels, it is clear that these contacts must have occurred with vessels owned or controlled by the same employer."[27]

Petitioner has also referenced there is a conflict with the Second Circuit Court of Appeals in *Fisher v. Nichols,* 81 F.3d 319 (2nd Cir. 1996). The facts surrounding the plaintiff in *Fisher* are entirely distinguishable from the facts in Petitioner's case. In *Fisher,* Fisher was employed for one day to carry out functions designed to effectively sail a vessel during a race. The question before the Second Circuit was articulated as follows:

> Whether his (Fisher) regular sea-based employment coupled with the work he was performing when the accident occurred, vests him with 'seaman' status or whether, as Nichols

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[25] *Id.* at 153.

[26] *Id.* at 153.

[27] *Id.* at 151.

> (employer) argues, we are confined in our analysis of Fisher's sea-based employment only to Fisher's connection with Nichols's yacht.[28]

The Second Circuit considered all of Mr. Fisher's previous sea-related activities and not just those pertaining to his employment with the employer at the time of his accident. In interpreting *Chandris,* the Second Circuit held it is not required that a Jones Act plaintiff "must necessarily have a substantial connection to a particular vessel owned by that employer or to a group of vessels under common ownership or control of that employer."[29]

The *Fisher* decision was decided prior to this Court's decision in *Papai.* As previously discussed, in *Papai,* this Honorable Court has instructed that if there is an identifiable group of vessels the question is whether the vessel is subject of common ownership or control.[30] This Court's ruling in *Papai* dispels any notion that there might be a conflict with the Second Court's ruling in *Fisher* and the Fifth Circuit.

Additionally, the Second Circuit's decision in *Fisher* is distinguishable from the *Roberts'* decision, as there was not any evidence of any other employment to be considered in deciding whether Mr. Roberts was a Jones Act employee.

C. No Confusion Or Lack of Uniformity in Interpreting this Issue Under the Jones Act

The Fifth Circuit in *Roberts* was clear and consistent within the guidance given by this Court in

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[28] *Fisher v. Nichols,* 81 F.3d 319, 322 (parenthesis added).

[29] *Id.* at 323.

[30] *Papai,* 520 U.S. at 556-557; quoting *Chandris,* 515 U.S. at 366.

Papai, Chandris and *Wilander.* As pointed out by the Petitioner in *Chandris*:

> The Court's 'strong concern for uniformity' in admiralty law, *Moragne,* 398 U.S. at 401, is directed at maintaining the smooth flow of maritime commerce by ensuring that 'all vessel operators are subject to the same duties and liabilities.' *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 676 (1982). This Court granted certiorari in other areas of maritime law where the legal principles were either outdated or subject to conflicting interpretations by the circuit courts. *Howlett v. Birkdale Shipping Co. S.A.,* _U.S._, 114 S.Ct. 2057 (1994); *Wilander,* 498 U.S. 337; *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos,* 451 U.S. 156 (1981); *United States v. Reliable Transfer Co., Inc.,* 421 U.S. 397 (1995).[31]

In Petitioner's case, there is not a true conflict with any circuit and the Fifth Circuit decision does not conflict with the relevant decisions of this Court.

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[31] Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., Petition for Writ of Certiorari at 16 (No. 94-325).

CONCLUSION

For the foregoing reasons, Petitioner's request for Writ of Certiorari should be denied.

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No. 01-1062

Supreme Court U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 2001

RUSTY ROBERTS, ET AL
Petitioner
v.

CARDINAL SERVICES, INC.; ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF IN REPLY

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PURPOSE OF THIS REPLY BRIEF

In its brief in opposition, Respondent makes a number of statements that are not supported by the record and fails to direct the attention of the Court to *Buford v. Cardinal Services, Inc.*, 01-0738 (La.App. 3 Cir, 12/12/01); 801 So.2d 1269, a case involving Respondent and its counsel and legal issues almost identical to those before the Court that is adverse to Cardinal's position and was decided prior to the filing of its brief in opposition.

In addition, Respondent fails to address Questions 2 and 3 concerning the impact of the change in employment circumstances presented by the purchase by Cardinal of an extensive fleet of liftboats and the exclusive use of this fleet of liftboats by Roberts and by Buford for more than a year prior to the accident and by Roberts' promotion to P & A operator and his new and additional duties.

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ARGUMENT

FAILURE TO CITE CONTROLLING AUTHORITY

Respondent's brief in opposition fails to cite *Buford v. Cardinal Services, Inc.*, 01-0738 (La.App. 3 Cir, 12/12/01); 801 So.2d 1269, even though its holding and reasoning, as discussed hereinafter, are directly adverse to the position of Cardinal, and the case was not disclosed by Petitioners. This violation of the duty of candor toward this tribunal (Louisiana State Bar Association, Rules of Professional Conduct, Rule 3.3(a)(3), *Continental Laboratory Products, Inc. v. Medax International, Inc.*, 1999 U.S. Dist. LEXIS 15383, *46-49 (SD Cal. 1999)) is particularly egregious since not only is the client, Cardinal, the same but the attorney (Duncan) is also the same. *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1291 (9th Cir. 1983); *In the Matter of Thonert*, 733 N.E.2d 932, 932-34 (Ind. 2000).

THE IMPORTANCE OF THE BUFORD CASE

Buford was a wireline helper employed by Cardinal who served exclusively aboard Cardinal liftboats and other Cardinal vessels, and also worked, as did Roberts, on stationary platforms and in the Cardinal shop for a substantial percentage of his work time. In reversing the summary judgment granted by the district court, the Louisiana court of appeal found that Buford's duties, including cleaning up the work area and platform, lubricating and painting, which were performed on land, on fixed platforms, and on vessels, could be considered to contribute to the mission of the vessel, *Buford*, 801 So.2d at 1274-75, and the vessel to contribute to the success of the wireline mission, *Buford*, 801 So.2d at 1275, and that Buford was "doing the ship's work," *Buford*, 801 So.2d at 1275. It noted that seaman status to wireliners under certain conditions had been conceded by Cardinal's counsel at oral argument. *Buford*, 801 So.2d at 1273.

That court also found that Buford's "work necessarily took him to sea to various platforms locations, notwithstanding the fact that he was flown by helicopter to the platform" where he was hurt. *Buford*, 801 So.2d at 1276.

The *Buford* court properly analyzed Buford's entire employment with Cardinal, which appears to have been coterminus[1] with that part of Roberts' employment during which he was solely assigned to Cardinal vessels and not to any third party vessels. This examination necessarily considered all five of those Cardinal vessels and found that, despite substantial shop and platform-only duties, Buford's seaman status was an issue for the jury and was not suitable for summary judgment. *Buford*, 801 So.2d at 1277. Although the *Buford* court considered that it was likely that a jury would find that Buford spent more than the thirty percent so often mentioned, it did not find that this number had any special magic.

> Given the facts of this case, we conclude that a reasonable jury could find such hazardous exposure if it first found that Mr. Buford fell short of the 30 percent duration requirement of the second prong. Again, we make this point only as an aside, and reiterate again that we believe that a reasonable jury could find that Mr. Buford has met the 30 percent requirement and the two-part, conjunctive test for seaman status. *Buford*, 801 So.2d at 1278.

CARDINAL HAS MISSTATED THE RECORD

A. Robert's Duties Changed When He Became an Operator

Roberts was hired as a P & A helper at $7.50 per hour to do whatever they are asked to do, weld, work on equipment, work for wireline, or "go work for jackups or work for whoever, whatever they want you to do." (Roberts, R-865.) As described by the P & A supervisor, Lott, a P & A helper is someone who has done manual labor and is willing to work, and preferably one who is willing to learn other jobs and move up (Lott, R889).

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[1] Roberts was injured on May 21, 1998. Buford was injured in June 11, 1998.

Accordingly, when Roberts was officially promoted to P & A operator (Roberts, R840) on September 9, 1997, effective September 8, 1997 (Roberts, R840), under circumstances in which he had done operator's work for several months before (Roberts, R840, 842), his job duties changed (Roberts, R849), and he got a raise (Lott, R905b).

Roberts' promotion to P & A operator, *de facto*, by mid July, 1997 and effective in September, 1997, had a dramatic effect on the percentages that he spent on vessels. Even using Cardinal's location and vessel assumptions (RA1-4) (which, as will be seen, *infra,* are suspect and also contain arithmetic errors), Roberts' percentages of non-Cardinal vessel hours and duties drop remarkably to 56.19% and 55.87% respectively, thus placing Roberts on Cardinal's fleet of vessels at 43.81% (July, 1997) and 44.13% (September, 1997) and substantially in excess of the thirty percent guideline established by this Court.

After the acquisition of additional vessels by Cardinal (Roberts, R863, 891b) and the policy of Cardinal to use its equipment and services as much as possible (Lott, 891b), the duties of Roberts, who considered himself as a member of an integrated Cardinal team, changed dramatically as a practical matter, and he ceased doing exclusively P & A work (R866-56, salvage; R857, integrated services; R863, and wireline or coil tubing, R859 and R866, 867 (all Roberts), which were entirely different businesses from P & A work, Lott, R886b, 887, 889b).

On a job in October of 1997, the operators of the E.J. HENRY, a Cardinal jackup, nearly sank the vessel because the hatch was left open while jacking down and Roberts, then a P & A operator, had to put on a life vest and go into the water to cut the things loose that were preventing the jackup from retracting its legs, being stuck in the mud, and capsizing (Roberts, R854-55).

After he became an operator, Roberts would do deckhand work on the Cardinal jackups, which he had never done on the third-party jackups, that included cleanup, moving things to balance the weight, and fixing the hydraulic lines on the crane (Roberts, R863-64).

> If it is not Cardinal, no, that's what they've got deckhands for. I mean if we leave big pieces of metal, yes, we pick that up, but as far as cleaning them, no, that's not our company. That's what we pay them for, you know. They got a deckhand, that's his job, that's what he gets paid for. That is not part of our company (Roberts, R864).

At Opp. p. 3, it is stated that "on those occasions where Mr. Roberts worked other than on a fixed platform where no vessel was involved or in the cardinal shop or yard, he still performed strictly P&A operator duties and never worked as a crew member of any vessel." The cited record support is R857, 864, 877, 880, 881, 913, 932, 938 b, 939.

R857, a part of the Roberts' deposition (pp. 270-273),concerns the fact that Roberts worked with Cardinal for an integrated team with the E line, slickline, P & A, coil cubing, and a Cardinal boat and that the integrated services were new at that time. It also concerns the fact that Mr. Roberts worked as a deckhand on a jackup on one or two occasions because there was an emergency with the regular deckhand.

R864, Roberts' deposition pp. 298-301, concerns the fact that in addition to the one experience when Roberts was a deckhand on a jackup, he had done deckhand work on Cardinal vessels, including mechanic work, that was not just helping out. A description of the deckhand work is also given on that page. R877, 880 and 881 are pages from the self-serving affidavit of Lott that are not supported by his deposition. R 913 assumes that Roberts did exclusively P & A work. R938, 939b do not seem to apply to Roberts' many tasks after he became an operator.

At Opp. p. 4, it is stated that "Petitioner's argument that Cardinal had a "change in the employer's method of working" by using its own vessels, as opposed to third party vessels, is *non sequitur*. This does not create a 'new assignment' for Mr. Roberts as his duties as a P&A employee never changed during his entire tenure with Cardinal." As discuss, *supra*, the citations to R 880, 912(b) and 913 do not change the new and additional duties assigned to and undertaken by Roberts.

B. The Work Was Dangerous and Took Roberts to Sea

A liftboat is "an elevating, self-elevating work platform. The boat has the ability to transit to any location, waterborne location, and elevate itself out of the water. And when that happens, it provides a stable work platform in which to work off of out of the sea condition. It can jackup anywhere to platforms, anywhere it wants really." It is self-propelled, and has sleeping quarters and a galley to eat.(Dale James Mitchell, Cardinal Marine Division manager, R936b).

Roberts' work as operator, as described, *supra*, was dangerous. P & A orientation included one day on water survival (Lott, R888b). For a job for Burlington Resources, the salvage of an entire group of platforms meant the substitution of a second Cardinal liftboat that was larger and a mid-Gulf transfer of men and equipment (Roberts, R857-59, 862-63) He was injured on April 30, 1997 when a rusty door came off of its hinges on a platform that was to be decommissioned (Roberts, R851-52). He was warned not to touch the crane of a Gulf Island liftboat because it had collapsed before (Roberts, R850-51).

C. Other Misstatements in the Opposition Brief

Although Cardinal avers that P & A work can be done on land, this is not supported by the record, which demonstrates that it is done by Cardinal on offshore platforms by cutting the drill casings twenty feet beneath the mud line and cementing them off, after salvaging everything that could be salvaged (R863).

At Opp p. 3, it is stated that "reference to Mr. Roberts as an 'offshore construction worker' is inaccurate. It was undisputed in the lower court that the work of P&A employees was to shut down and plug oil and gas wells." In order to justify this statement, Respondent cites R838, 880, 912b, 913, 916.

R838 is a part of the Roberts' deposition (202-205), which concerns when the Cardinal's office where Roberts worked was moved from Houma, Louisiana to Gray and also refers to Roberts' job with the P & A department. A description of his work is also given on this page. There is no discussion of onshore P & A work or any of the other jobs and duties that Roberts had. R880 again assumes that Roberts only did P & A work, as do the repeated citations to R912b, 913, and 916.

D. Inaccuracies in Cardinal's Depiction of Roberts' Work Record

Although Cardinal suggests that the chart and percentages of work performed by Roberts is gospel, the summary of Roberts' work attached as Exhibit B to the motion for summary judgment (R955-58), Appendix RA hereto, is not entirely consistent with Roberts payroll records, and the summary used by Respondent and the courts below contains arithmetical errors.

The lack of precision in determining whether a liftboat was present or used that is referenced in Lott's testimony (R890b, 891b-92, 892-892b, 895b-896b) also resulted in determinations of whether or not there were liftboats that were fudged in favor of non-vessel work and were contrary to Roberts' definite recollection (Roberts, R843-45).

Whether Roberts' working in the Cardinal shop when offshore work was not available or during his normal time off (Roberts, R863, Lott, R891) detracted from his seaman status is an issue for the jury.

There were a number of occasions, not recorded in the Cardinal records, where Roberts acted as a deckhand prior to his promotion (Roberts, R857) and for the wireline or coil tubing departments afterwards (Roberts, R859, 863, 938b).

Moreover, Cardinal characterizes as shop time 247.23 hours that were spent on light duty in the shop after Roberts' injury on April 30, 1997 (Roberts, R851-52). This is almost five percent of his total working hours and is therefore material, since it would substantially impact the percentages urged by Cardinal

CONCLUSION

Given the varying ways in which Roberts' employment record with Cardinal could be characterized, his promotion to operator and the additional responsibilities and varied duties, and the simultaneous dramatic shift from the use of third party vessels to exclusively Cardinal vessels that was coincident with Cardinal's substantial acquisition of additional liftboats as well as the completely opposite result reached in the factually and legally indistinguishable *Burford* case, the writ in this case should be granted. This would also permit clarification of this Court's decision in *Chandris v. Latsis,* 515 U.S. 347, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). Petitioners therefore request that this Court grant their Petition for Certiorari.

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RA1

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SUMMARY OF RUSTY ROBERTS' WORK HISTORY
WHILE EMPLOYED BY CARDINAL SERVICES, INC.
FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Nov. 18 – Dec. 1 - 1996	Dec. 2 – Dec. 15 1996	Dec. 16 – Dec. 29 1996	Dec. 30 – Jan. 12	Jan. 13 – Jan. 26 1997	Jan. 27 – Feb. 9 1997	Feb. 10 – Feb. 23 1997	Feb. 24 – March 9 1997	March 10 – March 23 1997
Shop Time	27.58	14.20	9.60	66.07	29.0	78.21	126.26	51.51	35.20
Plug & Abandonment work on Platform with no vessel	0	0	0	0	156	52.0	0	0	0
Plug & Abandonment Work on Platform with 3rd party vessel adjacent to platform	0	172	142	29.0	0	0	0	132	124
Plug & Abandonment Work on Platform with Cardinal Lift-boat vessel adjacent to platform	0	0	0	0	0	0	0	0	0
Travel Time to and from job site	0	8	12	0	[illegible]	0	0	1	3

Payroll Dates	March 24 – April 6 1997	April 7 – April.20 1997	April 21 – May 4 1997	May 5- May 18 1997	May 19 – June1 1997	June 2 – June15 1997	June 16 – June 29 1997	June 30 – July 13 1997	July 14- July 27 1997	July 28- August 10 1997
Shop Time	0	27.08	19.20	91.99	136.04	69.74	24.12	51.26	43.42	0
Plug & Abandonment work on Platform with no vessel		73	154	0	41	56	123	40	39	0
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	114	53	0	0	0	0	0	0	0	0
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	0	0	0	0	0	0	0	0	116	159
Travel time to and from job site	3	3	0	0	0	3	2	0	3	0

SUMMARY OF RUSTY ROBERTS' WORK HISTORY
WHILE EMPLOYED BY CARDINAL SERVICES, INC.
FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Aug. 11 – Aug. 24 1997	Aug. 25 – Sept. 7 1997	Sept. 8 – Sept. 21 1997	Sept. 22 – Oct. 5 1997	Oct. 6 – Oct. 19 1997	Oct. 20 – Nov. 2 1997	Nov. 3 – Nov. 16 1997	Nov. 17 – Nov. 30 1997	Dec. 1 – Dec. 14 1997
Shop Time	4.91	0	4.07	18.52	100.82	0	0	26.23	55.02
Plug & Abandonment work on Platform with no vessel	150	119	107	0	0	145	236	66	42
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	0	0	0	0	0	0	0	0	0
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	0	0	0	129	21	0	0	0	71
Plug and abandonment work on the Cardinal vessel, CARDINAL 1	0	0	0	0	0	0	0	25	0
Travel time to and from job site	10	3	8	4.5	4.5	3	0	8	8

SUMMARY OF RUSTY ROBERTS' WORK HISTORY WHILE EMPLOYED BY CARDINAL SERVICES, INC. FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Dec. 15 – Dec. 28 1997	Dec. 29 – Jan. 11	Jan. 12 – Jan. 25 1998	Jan. 26 – Feb. 8 1998	Feb. 9 – Feb. 22 1998	Feb. 23 – Mar 8 1998	Mar. 9 – Mar. 22 1998	Mar. 23 – April 5 1998	April 6 – April 19 1998
Shop Time	0	10.60	0	0	0	7.02	45.96	22.26	14.38
Plug & Abandonment work on Platform with no vessel	30	0	0	0	37	56.5	0	134	0
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	0	0	0	0	0	0	0	0	26
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	96	108	12	177	72	79	42	0	119
Plug and abandonment work on the Cardinal vessel, CARDINAL 1	0	0	0	0	0	0	0	0	26
Travel time to and from job site	10	6	0	0	3	0	0	0	3

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SUMMARY OF RUSTY ROBERTS' WORK HISTORY
WHILE EMPLOYED BY CARDINAL SERVICES, INC.
FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	April 20 – May 3 1998	May 4 – May17 1998	May 18 – May 31 1998	
Shop Time	0	3.09	0	
Plug & Abandonment work on Platform with no vessel	0	184	66	
Plug & Abandonment Work on Platform with 3rd party vessel adjacent to platform	0	0	0	
Plug & Abandonment Work on Platform with Cardinal Lift-boat vessel adjacent to platform	176	30	0	
Travel time to and from job site	2	0	0	